(25,862)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 1032.

H. A. A. SMITH, AUDITOR OF THE PANAMA CANAL, PLAINTIFF IN ERROR,

vs.

WILLIAM H. JACKSON.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 2, 1917.

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UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit.

Pleas and Proceedings Had and Done at a Regular Term of the United States Circuit Court of Appeals for the Fifth Circuit, Begun on Friday, November 24th, A. D. 1916, at New Orleans, Louisiana, Before the Honorable Don A. Pardee and the Honorable Richard W. Walker, Circuit Judges, and the Honorable William I. Grubb, District Judge.

H. A. A. SMITH, Auditor of the Panama Canal, Plaintiff in Error,

versus

WILLIAM H. JACKSON, Defendant in Error.

Be it remembered, that heretofore, to-wit, on the 22nd day of September, A. D. 1916, a transcript of the record of the above styled cause, pursuant to a writ of error to the District Court of the Canal Zone, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 2997, as follows:

Transcript of Record.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2997.

H. A. A. SMITH, Auditor of the Panama Canal, Plaintiff in Error,

versus

WILLIAM H. JACKSON, Defendant in Error.

Error to the District Court of the Canal Zone.

[Original Record Filed September 22, 1916.]

U. S. Circuit Court of Appeals. Filed Nov. 23, 1916. Frank H. Mortimer, Clerk.

ABSTRACT OF RECORD.

WILLIAM H. JACKSON,
Relator,

versus Civil No. 107.

H. A. A. SMITH, AUDITOR,
Respondent.

C. P. Fairman and Wm. C. MacIntyre, of Colon, R. P., and Harmodio Arias and Stevens Ganson, of Panama, R. P., attorneys for relator.

Charles R. Williams, District Attorney, of Ancon, C. Z., attorney for respondent.

APPEALED, July 18th, 1916, from the District Court of the Canal Zone. Hon. Henry D. Clayton, Judge presiding.

United States of America,
Canal Zone,
District Court. ss.

In the Balboa Division.

Pleas before the Honorable William H. Jackson, Judge of the District Court of the Canal Zone, thereof begun and holden at Ancon, in the Balboa Division of said District Court, on the 3rd day of April, being the first day of the April term thereof, in the year of Our Lord one thousand nine hundred and sixteen.

Present: Hon. William H. Jackson, Judge,
Hon. Charles R. Williams, District Attorney,
Mr. William H. May, Marshal.
Attest: Elbert M. Goolsby, Clerk.

And the following proceedings were had:

PETITION FOR WRIT OF MANDAMUS.

United States of America. Panama Canal.

In the District Court of the Canal Zone: Balboa Division.

William H. Jackson, Relator,

vs. Number . . . Civil.

H. A. A. Smith, Auditor of the Panama Canal, Respondent.

Petition for Writ of Mandamus.

To the Honorable, the Judge of the District Court of the Canal Zone; Sitting in the Balboa Division:

The petition of William H. Jackson, of Ancon, Canal Zone, respectfully showeth:

2 First. That your petitioner is the duly appointed, qualified and acting Judge of the District Court of the Canal Zone, having been appointed thereto for a term of four years by the President of the United States, and having been confirmed by the Senate of the United States, and thereafter, to-wit, on the first day of May, 1914, was duly sworn and assumed the duties of his office.

Second. That pursuant to the Act of Congress, approved August 24, 1912, also known as the "Panama Canal Act", it was provided that the District Judge of the Canal Zone "shall receive the same salary paid to the District Judges of the United States", that is to say, the sum of $6,000.00, United States currency per annum, payable in monthly installments of $500.00, each.

Third. That the Congress of the United States has heretofore appropriated funds for the payment of the salary of your petitioner, and that the funds are now available for that purpose.

Fourth. That H. A. A. Smith, the above named respondent, is now, and was at all times hereinafter mentioned, the duly appointed, qualified and acting Auditor of the Panama Canal, and as such it was his duty, among other things, to audit, issue and deliver each month to your petitioner, the warrant, voucher or paycheck for the payment of the monthly salary due to your petitioner, and to approve and audit the said warrant, voucher or paycheck, in such form and manner that your petitioner may collect and receive the cash thereon from the Paymaster of the Panama Canal from the funds appropriated by the Congress as aforesaid.

Fifth. That during the month of December, 1914, your petitioner well and truly performed his duties as Judge of the said District Court of the Canal Zone, and upon the termination of said month became entitled to receive his warrant, voucher or paycheck for the payment of his monthly salary in the sum of $500.00, and it became and was the legal duty of the said H. A. A. Smith, Auditor of the Panama Canal, to audit, approve and issue said warrant, voucher or paycheck, and cause the same to be delivered unto your petitioner.

Sixth. That notwithstanding the fact your petitioner was legally entitled to receive the said warrant, voucher or paycheck for the full sum of $500.00, United States currency, in payment of his monthly salary for
3 the month of December, 1914, at the termination of said month, and that it is and was the legal duty of the said H. A. A. Smith, Auditor of the Panama Canal, to audit, issue and deliver to your petitioner the said warrant, voucher or paycheck, for the full sum of $500.00, United States currency, the said H. A. A. Smith, Auditor as aforesaid, failed and refused, and still fails and refuses to audit, issue and deliver to your petitioner, the said warrant, voucher or paycheck for the full amount of the monthly salary due him for the month of December, 1914, and has unlawfully withheld and still withholds from the amount due your petitioner, the sum of $170.07,

to secure the payment of an alleged indebtedness, which the said H. A. A. Smith, Auditor as aforesaid, unlawfully and wilfully pretended, and still pretends is due from your petitioner unto the Panama Canal or to the United States Government. That although your petitioner has demanded the issuance and delivery of the said warrant, voucher or paycheck covering the sum of $170.07, unlawfully withheld as aforesaid, the said H. A. A. Smith, Auditor of the Panama Canal, has failed and refused and still fails and refuses so to do.

Seventh. That during the month of March, 1916, your petitioner well and truly performed his duties as Judge of the District Court of the Canal Zone, and upon the termination of said month became entitled to receive the warrant, voucher or paycheck for the payment of his monthly salary in the full sum of $500.00, United States currency, and it became and was the legal duty of the said H. A. A. Smith, Auditor of the Panama Canal, to audit and issue said warrant, voucher or paycheck and cause the same to be delivered to your petitioner. That notwithstanding the fact that your petitioner is legally entitled to receive the warrant, voucher or paycheck for the full sum of $500.00, United States currency, in payment of his salary for the month of March, 1916, and that it is the legal duty of the said H. A. A. Smith, Auditor of the Panama Canal, to audit, issue and deliver to your petitioner the said warrant, voucher or paycheck for the full sum of $500.00, United States currency, the said H. A. A. Smith, Auditor as aforesaid, has failed and refused, and still fails and refuses to audit, issue and deliver the said warrant, voucher or paycheck
4 for full amount of $500.00, United States currency, and is unlawfully withholding the same from your petitioner to secure the payment of an alleged indebtedness, which the said H. A. A. Smith, as Auditor of the Panama Canal, unlawfully claims and pretends is due from your petitioner unto the Panama Canal or to the United States Government, and although your petitioner has made due demand, the said H. A. A. Smith,

Auditor of the Panama Canal, has failed and refused, and still fails and refuses to issue and deliver said warrant, voucher or paycheck, as is his legal duty so to do.

Eighth. That your petitioner is not indebted in any sum or sums whatsoever unto the Panama Canal or unto the United States Government, nor was he so indebted in the month of December, 1914, or in the month of March, 1916, and that there is no judgment, lien or lawful order whereby the said warrants, vouchers or paychecks may lawfully be withheld from your petitioner by the said H. A. A. Smith, Auditor of the Panama Canal, to secure or satisfy any alleged or pretended indebtedness due from your petitioner unto the Panama Canal or the United States Government.

Ninth. That the action of the said H. A. A. Smith, Auditor of the Panama Canal, in withholding the issuance and delivery to your petitioner of the warrants, vouchers or paychecks above mentioned, tends to and does deprive your petitioner of rights, privileges and immunities guaranteed and preserved to him under the Constitution of the United States, under the laws of the United States, and under the laws of the Canal Zone.

Tenth. Your petitioner further avers that the action of the said H. A. A. Smith, Auditor of the Panama Canal, in failing and refusing to audit, issue and deliver to your petitioner, the warrants, vouchers and paychecks for services performed as hereinbefore set forth, tends to and does deprive your petitioner of his property without due process of law.

Eleventh. Your petitioner further alleges that there is no other plain, speedy or adequate remedy by which his rights, privileges, immunities and property may be protected and preserved, save that a writ of mandamus issue out of this Honorable Court, directed to the said H. A. A. Smith, Auditor of the Panama Canal, commanding him, the said H. A. A. Smith, Auditor of the

Panama Canal, to audit, issue and deliver unto your petitioner, the warrants, vouchers or paychecks in the sums of $170.07, and $500.00, United States currency, respectively, in payment for the services performed by your petitioner as Judge of the District Court of the Canal Zone, during the months of December, 1914, and March, 1916.

Wherefore, your petitioner being without remedy other than that sought herein, respectfully prays that a preemptory Writ of Mandamus issue out of this Court directed to the said H. A. A. Smith, Auditor of the Panama Canal, and commanding him as such Auditor of the Panama Canal, to audit, draw, issue and deliver unto your petitioner, the warrants, vouchers or paychecks for the said amounts and sums of $170.07, and $500.00, United States currency, and to do and perform such other acts and things as may be necessary and proper in the premises.

And your petitioner further prays all such other and further, or different relief in the premises as may be deemed just and proper and as the exigencies of the case may require.

(sgd) WM. C. MACINTYRE,
(sgd) C. P. FAIRMAN,
Solicitors for Wm. H. Jackson, Relator.

United States of America,
Canal Zone,
Balboa Division. ss.

William H. Jackson, of lawful age, being first duly sworn according to law, on oath states:

That he is the petitioner named in the above and foregoing petition for Writ of Mandamus, that he has read the same and knows the contents thereof, and that the facts therein set forth and alleged are true, save as to the matters therein alleged upon information and belief, and as to such he verily believes them to be true.

(sgd) WILLIAM H. JACKSON.

Subscribed and sworn to before me this 12 day of April 1916.

(sgd) E. M. GOOLSBY,
[Seal] Clerk of the District Court.

Filed, Apr. 11, 1916, in the office of the Clerk of the District Court, Canal Zone.

(sgd) E. M. GOOLSBY, Clerk.

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6 BOND FOR COSTS.

In the District Court of the Canal Zone, Division of Balboa.

We, the undersigned, Wm. H. Jackson, principal, and E. M. Goolsby, surety, acknowledge ourselves indebted to the Government of the Canal Zone in the sum of Twenty-five dollars, for the payment of the same, we bind ourselves, our heirs, administrators, and assigns.

The condition of this obligation is that, whereas the above named Wm. H. Jackson has this day commenced mandamus proceedings against H. A. A. Smith, Auditor of The Panama Canal, in the District Court of the Canal Zone for the Division of Balboa, the said principal will pay all costs as finally may be awarded against him in the said proceedings; otherwise this obligation shall be of full force and effect.

In witness whereof, we have hereunto set our hands at Ancon in the Canal Zone this 11th day of April, 1916.

(Sgd) WM. H. JACKSON,
Principal.

(Sgd) E. M. GOOLSBY,
Surety.

Filed Apr. 11, 1916, in the office of the Clerk of the District Court, Canal Zone.

(Sgd) E. M. GOOLSBY,
Clerk.

* * * * * * * * * *

7 DISQUALIFICATION OF JUDGE.

United States of America. Canal Zone.

In the District Court in and for the Canal Zone Balboa Division.

8 William H. Jackson, Relator,
vs.
H. A. A. Smith, Auditor of the Panama Canal, Respondent.

Disqualification of Judge.

Whereas, in the above entitled action the undersigned Judge of the District Court for the Canal Zone is a party to the litigation and has a pecuniary interest therein, and

Whereas, said Judge is disqualified under Section 8 of the Code of Civil Procedure of the Canal Zone from sitting as judge in the hearing of said cause;

The undersigned Judge hereby declares himself disqualified from sitting in the hearing in this cause or from participating herein in any manner other than as a litigant.

(Sgd) WM. H. JACKSON,
Judge, District Court.

Filed Apr. 12, 1916, in the office of the Clerk of the District Court, Canal Zone.

(Sgd) E. M. GOOLSBY, Clerk.

ANSWER OF RESPONDENT.

United States of America. Panama Canal.

In the District Court in and for the Division of Balboa, Canal Zone.

William H. Jackson, Relator,
vs. Number..... Civil.
H. A. A. Smith, Auditor of the Panama Canal, Respondent.

Answer of Respondent.

Now comes the respondent, H. A. A. Smith, Auditor of the Panama Canal, by his counsel, Charles R. Williams, District Attorney of the Canal Zone, and for answer to the Petition for Writ of Mandamus says:

9 First. Respondent admits the allegations of paragraph first of the petition.

Second. Respondent admits the allegations of paragraph second of the petition, but says that the Panama Canal Act therein referred to also provides that the District Judge, the District Attorney, and the Marshal for said district shall not receive any emoluments except their salaries.

Third. Respondent admits the allegations of paragraph third of said petition, but respondent says that the allegations of the remaining paragraphs of relator's petition which can be admitted by respondent are so connected with allegations which can not be admitted, that they cannot be separated therefrom; and therefore respondent denies each and every allegation of each and every other remaining paragraph, except such allegations as are hereinafter specifically admitted in this answer.

Fourth. Respondent admits that relator earned a full month's salary for the month of December, 1914, and a full month's salary for the month of March, 1916.

Fifth. Respondent admits that he is the Auditor of The Panama Canal but says that under the law he is not an independent or final auditor, but that his audit of the accounts of the Panama Canal and of the United States is administrative only, and that in examining and auditing all claims and demands against the Panama Canal his duties as such Auditor are limited to recommending for approval for payment only such claims and demands as are undisputed by the United States or The Panama Canal, and that all the respondent's actions in recommending for approval payments out of the funds of the United States or The Panama Canal are subject to review and direction of Officers of the Treasury Department of the United States, to-wit, the Auditor for the War Department of the United States and the Comptroller of the Treasury of the United States, and the respondent says that he cannot under the law authorize the making of any payment disapproved of or forbidden by said Comptroller of the Treasury, and respondent says that all Officers of The Panama Canal have been forbidden by the Comptroller of the Treasury, as hereinafter shown,
to approve for payment and to pay relator's
10 claim of $170.07 as part of the salary for the month
of December, 1914, and of the $500.00 salary for the month of March, 1916.

Sixth. Respondent further answering, says that under the law all claims or demands of whatsoever kind or character against the United States involving a payment of money, and including the payment of relator's salary, are matters to be settled at the Treasury Department of the United States at Washington; and that the auditing and approving for payment and payment of all such demands, including relator's salary, by the Auditor and the Paymaster of the Panama Canal, is done as a matter of convenience for the Government of the United States and is not done as a compliance with any legal right of the relator, and respondent therefore denies that relator has the legal right to demand the auditing and approving

for payment of relator's monthly salary by the Auditor of The Panama Canal.

Seventh. Respondent further answering, says that under the law, the United States, through the Treasury Department at Washington, has the right to withhold until settlement the payment of any kind of a money demand against the United States, including the demand for payment of relator's salary, when it appears that relator or such creditor of the United States is also indebted to the United States; and respondent therefore denies that the withholding of payment of relator's salary is a violation of relator's constitutional rights or the depriving relator of his property without due process of law, but that the same is the exercise of the legal right of the Government as a debtor to set off any indebtedness against its creditor.

Eighth. Respondent further answering relator's petition, says that during the month of December, 1914, relator was justly indebted to The Panama Canal and the United States in the sum of $170.07 for rent of relator's residence and electric current therefor, House No. 118, Ancon, Canal Zone; and in the month of March 1916, was and still is justly indebted to The Panama Canal and the United States in the sum of $773.30 for rent of relator's residence and electric current therefor, House No. 311, Ancon Canal Zone; and in addition thereto is also now justly indebted to The Panama Canal
11 and the United States for rent of relator's residence and electric current furnished thereto for the month of April, 1916; and in addition thereto is now justly indebted to The Panama Canal and the United States in the sum of $2.00, for medical services rendered during the month of February, 1916. And respondent hereto attaches and makes a part of this answer a true and correct account of relator's indebtedness to The Panama Canal and the United States, marked Exhibit "A".

Ninth. Respondent further answering, says that the rental value of said residence No. 118, Ancon, was fixed

under the law by the Governor of The Panama Canal at a monthly rate of rental of $25.00 per month, and that same was a fair and reasonable rate of rental and the use and occupancy of said house was worth said rental to relator and to that extent was an emolument received from the Panama Canal in addition to the compensation of $500.00 per month; and respondent further says that the electric current was furnished in said house at the monthly rate of $5.55 per month, and was the approximate cost of said current, and that same was a fair and reasonable rate and well worth same to relator.

Tenth. Respondent further answering, says that House No. 311, Ancon, was let to relator at a rate of $50.00 per month, and that said rate was fixed under the law by the Governor of The Panama Canal, and that said rate was fair and reasonable and the use and occupancy of said house was well worth said rate to relator. And respondent further says that the charge for electric current supplied said residence No. 311, was the approximate cost of furnishing said current, and that same was well worth said rate to relator; and that relator, in a letter dated Sept. 25, 1914, addressed to the Chief Quartermaster of The Panama Canal, requested the letting to him of said residence, House No. 311, and specifically agreed to pay said rental, and a copy of said letter and other correspondence relating thereto is hereto attached and made a part hereof, and marked Exhibit "B"; and relator has paid a part of the rental of said House No. 311, as is shown by account hereto attached marked Exhibit "A".

Eleventh. Respondent further answering, says
12 that under the provisions of the Act of Congress of July 31, 1894, the Governor of The Panama Canal, upon request of respondent and of the Paymaster of The Panama Canal, has sought and obtained decisions from the Comptroller of the Treasury of the United States upon the questions of the relator's liability to The Panama Canal and to the United States for the indebtedness hereinbefore referred to and as to the legal right of The Panama

Canal and the United States to withhold payments of relator's salary, or so much thereof as is necessary, until relator has settled said indebtedness, as follows, to-wit: Decisions dated June 23, 1914, December 28, 1914, September 16, 1915, March 25, 1916, and April 11, 1916, copies of which are attached hereto and made a part hereof and marked respectively Exhibits "C", "D", "E", "F", and "G", and in each of said decisions it has been held and decided that relator is indebted to The Panama Canal and the United States, and that The Panama Canal and the United States have the right to withhold payment of relator's salary until said indebtedness is settled. Respondent says that these questions have been also submitted to the Attorney General of the United States. who has rendered decisions thereon, to-wit: Decisions dated July 8, 1915, and December 21, 1915, copies of which are hereto attached, made a part hereof, and marked respectively Exhibits "H" and "I".

Twelfth. Respondent admits that he, as Auditor of The Panama Canal, acting under the decisions of the Comptroller of the Treasury, did authorize the deduction of $170.07 from the relator's salary for the month of December, 1914, and did apply the same in payment of bills for rental of House No. 118, Ancon, and for electric current furnished to said house; and that he did refuse to approve for payment and ordered withheld from payment relator's entire salary for the month of March, 1916, until settlement of relator's indebtedness to The Panama Canal and the United States.

Thirteenth. Respondent further shows that relator has the right to file his claim for salary due him with the Auditor of the Treasury of the United States, known as the Auditor for the War Department, and the right to appeal from the adverse decision of said Auditor
13 for the War Department to the Comptroller of the Treasury of the United States. Also the right to now bring suit against the United States in the Court of Claims of the United States and the right of appeal

from the decision of said Court of Claims to the Supreme Court of the United States.

Fourteenth. The respondent further says that both the Auditor of The Panama Canal and the Paymaster of The Panama Canal, who are required by law to make such payments only as are undisputed claims against The Panama Canal, are bound by the decisions of the Comptroller of the Treasury, and that considering the premises hereof, respondent denies that relator is entitled to the relief in relator's petition prayed for, or to any other relief as against this respondent.

Fifteenth. And respondent, having fully answered said Petition for Writ of Mandamus, prays to be discharged with his usual costs.

(Sgd.) CHARLES R. WILLIAMS,
District Attorney of the Canal Zone,
Counsel for Respondent.

Personally appeared before the undersigned authority, H. A. A. Smith, who on oath deposes and says that he is the Auditor of The Panama Canal and respondent in the above Petition for Writ of Mandamus, and that the facts stated in the foregoing answer are true.

(Sgd.) H. A. A. SMITH,
Auditor, The Panama Canal.

Subscribed and sworn to before me this May 1st, 1916.

(Sgd.) E. M. GOOLSBY,
[Seal] Clerk, Dist. Court.

EXHIBIT "A".

Balboa Heights, Canal Zone.
April 28, 1916.

Wm. H. Jackson, U. S. District Judge, Ancon, Canal Zone.
To the United States of America—The Panama Canal,
Debtor.

For rent of house No. 118, Ancon, from May 1st to October 17, 1914, 5 months 17 days at $25.00 per month		$ 139.17
Electric current, same period, at $5.55 per mo.		30.90
Rent of house No. 311, (old No. 155) Ancon, from December 1, 1914, to April 30, 1916, 17 months, at $50.00 per month		850.00
Electric current, December 1, 1914, to January 31, 1915, at $7.00 per month		14.00
Electric current, February 1, 1915, to March 31, 1916, 6840 K. W. H., at 2¢ per K. W. H.		136.80
		$1170.87
Less amount due on account of House No. 118, Ancon, deducted on pay roll for December, 1914	$170.07	
Various payments March to June 1915	177.50	347.57
Balance due for rent and electric current		$ 823.30
Medical services rendered, as per Ancon Dispensary certificate No. 9932, dated February 1, 1916		2.00
Balance due		$ 825.30

EXHIBIT "B".

Ancon, C. Z., Sept. 25th, 1914.

Capt. R. E. Wood,
Chief Quartermaster,
Balboa Heights, C. Z.

Sir:

Replying to yours of the 24th inst. in which you say that the Bishop House can be assigned to me as soon as Mr. Rousseau's house is completed and as soon as the latter moves:

You will recall my personal conversation with you recently in which you requested that I surrender my present house upon my leaving for the States for my annual vacation and that I could accept an assignment of the Bishop House dating from the time of my return from the States with my family. I expect to leave for the States either October 10th or October 17th, depending upon how I may be able to dispose of the press of business in my Court at present. I will be glad to surrender possession of my present house upon my leaving for the States, if your department would kindly store my belongings for me pending my return, and upon my return, which will be about the latter part of November, I will be glad to avail myself of renting the Bishop House at the rental stipulated in your letter.

This arrangement I understand to be in ac-
15 cordance with our recent personal conversation and I will be glad to hear from you by letter confirming the same.

Respectfully,

(Sgd.) WM. H. JACKSON,

WHJ/t District Judge.

Balboa Heights,
September, 24, 1914.

Hon. Wm. H. Jackson,
District Judge,
Ancon, Canal Zone.

Sir:

Referring to your recent application to the Governor requesting that you be assigned the Bishop house. This house can be assigned to you as soon as Mr. Rousseau's house is completed and as soon as the latter moves. A rental of $25 a month exclusive of lights has been fixed for the house you are no [now] occupying. A rental of $55 a month, exclusive of lights has been fixed for the Bishop house.

Will you kindly advise as soon as possible whether you desire to receive assignment to the Bishop house when same becomes vacant.

Respectfully,

(Sgd.) R. E. WOOD,
Chief Quartermaster.

The Panama Canal.
District Court of the Canal Zone.
Ancon, June 29th. 1914.

Col. Geo. W. Goethals,
Governor,
Culebra, C. Z.

Sir:

Referring again to the opinion of the Comptroller of the Treasury to the effect that the judge, district attorney and marshal are not entitled to Government quarters free of rent. While it must be seriously doubted that the law-makers intended that the prohibition against receiving any emoluments except their salaries should receive such a strained construction, nevertheless, I call your attention to the fact that the law provides that these officials "during their terms of office shall reside within the Canal Zone". We are, therefore, compelled to look to the Panama Canal Government for quarters at such rental as may be prescribed.

Therefore, I beg to call your attention to my
16 letter to you of May 26th with regard to the assignment to me of a house for the use of myself and family and, in this connection, I would respectfully request that I have the privilege of renting the house at present occupied by Mr. Bishop at such rental as may be fixed by the Government for its use and occupation. I understand Mr. Bishop is leaving the third of July and that thereafter this house may be used for a short time by Mr. Rousseau and his family. After that time I should like the privilege of renting it for the use of my own family.

In making this application I am guided by many considerations of considerable personal convenience for myself and family. In the first place there is the propinquity of this house to the old administration building, where, I understand, the Court and the office of the judge is eventually to be located. Also the fact that I have purchased two horses from Mr. Bishop that are stabled in the Ancon corral and it would be very inconvenient for me to make use of them if I am to live so far away as Balboa. The most important consideration of all however is that at present I have stored in New York City a considerable quantity of furniture, a number of pictures and other personal effects, which, in consideration of the four years I expect to remain on the Zone, I would like to bring down here for the purpose of making use of them in my residence on the Zone.

The house I have at present is not large enough for that purpose. A house the size of Mr. Bishop's or the one occupied formerly by Mr. Metcalfe would give me the opportunity of bringing all my personal effects from the States down here and making use of the same during my stay.

Hoping in consideration of the above that I may have the privilege of renting one of these houses, perferably the one occupied at present by Mr. Bishop, I am

Respectfully,

(Sgd) WM. H. JACKSON,
WHJ/t District Judge.

EXHIBIT "B"

Ancon, C. Z., May 26, 1914.

Col. George W. Goethals,
Governor, Panama Canal, Culebra.

Sir:

I have to acknowledge receipt of your favor of the 20th inst. with regard to the house assigned for the use of myself and family. I fully appreciate the difficulties resulting from the large amount of work which at present devolves upon the supply department, and I wish to assure you that I have no desire to appear captious or to give any unnecessary trouble whatsoever. However, you state in your letter that the house formerly occupied by Mr. Metcalfe is to be reserved, and I notice in the paper of this date that the same has been offered to the Joint Land Commission for office purposes, and I presume that
17 it will, therefore, be assigned for family use after the termination of the work of the Joint Commission. I have also heard from private sources that before a great while it is probable that the Bishop house will be unoccupied. The use of one of these houses would be a source of much pleasure and gratification to my wife and daughter, and I am writing to say that I will very gladly remain where I am for the present if I could expect to have assigned for my use either the Metcalfe or the Bishop house at some time in the future, say by January next.

Trusting that when the opportunity arrives this application may meet with your favorable consideration, I am,

Respectfully,

(SGD) WM. H. JACKSON.
Copy to Chief Quartermaster. District Judge.

EXHIBIT "C"

EWM-8-D
Treasury Department

Washington, June 23, 1914.

Col. Geo. W. Goethals,
Governor, Panama Canal,
Washington, D. C.

Sir:

I have your letter of the 1st instant, in which you submit for decision six questions as follows:

"(1) Are Justices of the Supreme Court of the Canal Zone to be considered as employees of the Isthmian Canal Commission within the meaning of the leave regulations?

"(2) If your answer to the foregoing question is 'Yes', can the accrued leave be commuted and payment therefor be made to such Justices on the date of the termination of their services?

"(3) If the accrued leave may be commuted, should such leave be computed to March 31, 1914, or to the actual date of the termination of their services?

"(4) If your answer to question 2 is 'No', can the period that these Justices may be retained in service be extended so as to cover any leave that may be due them at the time their work as Justices of the Supreme Court of the Canal Zone has actually terminated?

"(5) In view of these additional facts, can any leave accrue in favor of this Judge as a member of the Supreme Court of the Canal Zone after the date of assuming his duties as District Judge of the Canal Zone, following his confirmation by the United States Senate as such?

"(6) In view of the fact that specific provision is made by law fixing the salaries of the District Judge, District

Attorney and Marshal, are these officials to be considered as employees of the Panama Canal and as such entitled to the leave, quarters and other privileges extended to employees of the Panama Canal by the President's Executive Order of February 2, 1914?"

Said questions are based upon the statement
18 of facts contained in your letter, which contains citations and extracts of laws, orders, etc., having a material bearing upon the questions. It would seem unnecessary in this decision to make any extended quotation of these laws, orders, etc. The questions will be considered and answered in their order:

(1) I understand that it has been the uniform practice to apply the leave regulations of the Isthmian Canal Commission to the Justices of the Supreme Court of the Canal Zone, and I see no reason for treating the matter otherwise now. You state as a fact that the leave privilege of 42 days with pay during each service year has been uniformly extended to the Justices of the Supreme Court of the Canal Zone. So without entering into a discussion of the question whether or not they are employees of the Isthmian Canal Commission, I decide that the leave regulations are applicable to them.

(2) By resolution of the Isthmian Canal Commission adopted October 1, 1912, authority was given for payment of commutation of accrued leave due an employee at the date of the termination of his services. Circular No. 536, dated March 30, 1914, of the Commission, directs that all contracts of employment with or under the Commission shall terminate with the close of business on March 31, 1914, with the exception of those employees on sick or injury leave. Section 9 of the Panama Canal Act of August 24, 1912 (37 Stat., 566), provides that——

"The President may continue the Supreme Court of the Canal Zone and retain the Judges thereof in office for such time as to him may seem necessary to determine

finally any causes and proceedings which may be pending therein."

Section 13 of the Executive Order of the President, dated March 12, 1914, provides:

"The Supreme Court of the Canal Zone and the judges thereof shall continue to act after this order takes effect until the cases and business pending therein have been fully determined and disposed of; but cases tried in any of the Circuit Courts prior to April 1, 1914, shall not be heard in the Supreme Court unless the appeal is perfected and the case docketed in the Supreme Court before May 1, 1914."

You state that it is expected that the duties of the Justices of the Supreme Court will be terminated on or before June 20, 1914.

No provision is made for a Supreme Court of the Canal Zone under the new organization which went into effect April 1, 1914. The Supreme Court under the old organization was continued for such time as might be necessary to determine and dispose of the cases and business pending therein. This action merely extended the life of such part of the old organization over the period fixed for its termination, and continued the terms of the Justices of the Supreme Court to a date later than March 31, 1914, under the old organization.

Upon the facts appearing, under the law and regulations made in pursuance thereof, I am of opinion that the accrued leave (to the amount fixed in regulations) of the Justices of the Supreme Court may be commuted, and that it may be computed to the actual date of the termination of their services. (See, however, question 5 as applicable to one of the Associate Justices.)

(3) The answer to question 2 answers this question.

(4) The answer to question 2 being in the affirmative renders answer to this question unnecessary.

(5) You state that one of the Associate Justices of the Supreme Court of the Canal Zone was appointed District Judge of the Canal Zone pursuant to the authority contained in Section 8 of the Panama Canal Act
19 of August 24, 1912 (37 Stat., 565), and that he entered upon his duties as such May 8, 1914, following his confirmation by the United States Senate and commission by the President. The services of this Justice, therefore, as a part of the old organization, terminated May 7, 1914, and I am of opinion that leave under the old organization could not accrue to him to any later date.

The Attorney General rendered an opinion May 2, 1914, that such Associate Justice might sit as a member of the Supreme Court of the Canal Zone, if continued by proper order of the President, after he qualified as District Judge under the act of August 24, 1912, supra, though it must be without compensation for such services. To give such officer commuted leave for service after May 7, 1914, would be to compensate him for his services with the Supreme Court, which the Attorney General says he can not have and with which opinion as to compensation I agree.

(6) The district attorney and marshal appointed by the President under the provisions of the Panama Canal Act of August 24, 1912, supra, are officers and are entitled to their pay so long as they hold their commissions or appointments. The act providing for their appointment fixes no limit on the period they may be absent from their duties with pay, as is done in the case of the District Judge (see section 8, act of August 24, 1912, supra). The district attorney and marshal are not employees of the Panama Canal, but officers with salaries fixed by law (act of 1912) at $5000 per annum each. As the law of 1912 prohibits the judge, district attorney, and marshal

from receiving "any emoluments except their salaries," they are not entitled to government quarters free of rent. This question is answered accordingly.

Respectfully,

(Sgd) GEO. E. DOWNEY,
Comptroller.

JDT W

EXHIBIT "D"

Treasury Department.

Office of Comptroller of the Treasury. Washington, December 28, 1914.

Colonel George W. Goethals, U. S. A.,
Governor, The Panama Canal,
Balboa Heights, C. Z.

Sir:

I have your letters of the 14th and 15th instant, enclosing letters respectively from Mr. William K. Jackson, District Attorney of the Canal Zone, and Mr. William H. Jackson, Judge of the District Court of the Canal Zone, relative to the payment of rental for quarters occupied by them in the Canal Zone since April 1, 1914, and requesting a reconsideration of the decision of this office of June 23, 1914, (69 MS. Comp. Dec. 1704), wherein it was held that by virtue of the provisions of the act of August 24, 1912 (37 Stat., 565), prohibiting said officers from receiving "any emoluments except their salaries," they were not entitled to Government quarters free of rent. You now ask, in view of the representations made to you by the District Judge and the District Attorney a reconsideration of said decision and to be advised whether quarters may be assigned to the District Judge, the District Attorney and the Marshal of the Canal Zone without any charge being made against them for rental of same.

Section 8 of the act of August 24, 1912 provides:

"The district judge, the district attorney, and the marshal shall be appointed by the President, by and with the advice and consent of the Senate, for terms of four years each, and until their successors are appointed and qualified, and during their terms of office shall reside within the Canal Zone, and shall hold no other office nor serve on any official board or commission nor receive any emoluments except their salaries. * * * * The district judge shall receive the same salary paid the district judges of the United States, * * * * shall receive the additional mileage and per diem allowed by law to district judges of the United States when holding court away from their homes. The district attorney and the marshal shall be paid each a salary of five thousand dollars per annum."

The Century Dictionary defines the word "emolument" to mean "the profit arising from office or employment, that which is received as compensation for services, or which is annexed to the possession of office, as salary, fees and perquisites."

The synonyms for emolument are stated to be renumeration, pay, wages, stipend, income, benefit.

I think that it is in the sense of this definition that the word "emoluments" is used in the above statute. I can not agree w.th the contention of the district judge and the district attorney that the word refers only to fees or commissions that may be collected or received by these officials and the marshal. The statute has reference not only to these but to all other allowances whatsoever which are not in the nature of reimbursement, such as mileage and per diem. These latter are allowances in the nature of reimbursement and are not emoluments or remuneration or compensation or pay or wages in the sense in which the word "emoluments" is used in the statute.

The district judge, district attorney and marshal are officers. They hold public office. They are appointed by the President and confirmed by the Senate. A specific salary is attached to their several offices and the statute specifically prohibits them from receiving any emoluments except their salaries, and by emoluments is meant anything inuring to their benefit which is not reimbursement or an allowance in the nature of a reimbursement.

I feel obliged to adhere to the decision of June 23, 1914, and therefore have to advise you that under the law the officers referred to are not entitled to occupy Government quarters rent free.

The letters of the district judge and the district attorney are returned herewith as requested above.

Respectfully,

(sgd) GEO. E. DOWNEY,
W
Comptroller.

enc. JDT

21 EXHIBIT "E"

September 16, 1915.

The Governor of
The Panama Canal,
Balboa Heights, C. Z.

Sir:

I have your letter of the 21st ultimo requesting my decision as to whether the Paymaster, Panama Canal, is authorized to refund to District Judge William H. Jackson $170.07 deducted from his pay for the month of Dec. 1914, on account of house rent and electric current furnished him from May 1 to October 31, 1914.

The law providing for a district court in the Canal Zone and creating the office of judge thereof (sec. 8, Act of Aug. 24, 1912, 37 Stat., 565) fixes the salary of said office and expressly provides that the said district judge shall not receive any emoluments except his salary. The furnishing of quarters and electricity for the personal use of the judge would be in the nature of an emolument in addi-

tion to his salary and as such prohibited by the above-cited law.

If this judge received his full salary for the period from May 1, 1914, to Oct. 31, 1914 and in addition thereto was furnished house rent and electric current by the Government he has been over-paid while indebted to the Government and the amount of said overpayment was charged against subsequent salary otherwise due him.

You are advised therefore that if the amount deducted in this case is the correct amount of the emoluments received by this judge in addition to his salary for the period from May 1 to Oct. 31, 1914, refundment of the same is not authorized.

My predecessor in a decision of June 23, 1914 (69 MS. Comp. Dec. 1704) held that the judge was not entitled to use of Government quarters free of rent. It is assumed the deduction was made pursuant to that decision. It is not understood why, if the Panama Canal intends to furnish quarters, light, subsistence, or any property, it should do so in the absence of an agreement to pay therefor, or, if necessary, payment in advance. A deduction over protest does not seem to be the way to consummate a sale, and a question of a deduction over protest should not arise.

The voucher and other papers submitted are returned herewith.

Respectfully,

(Sgd) W. W. WARWICK,
Comptroller.

EXHIBIT "F"

Treasury Department

Office of
Comptroller of the Treasury — Washington,
In replying quote initials L.R.G. — March 25, 1916.

The Governor,
The Panama Canal,
(Through Washington Office, Washington, D. C.)

Sir:

I have your letter of the 11th instant, sub-
22 mitting memorandum of the Auditor of the Panama Canal and copies of correspondence referred to therein with reference to the liability of William H. Jackson, district judge of the Canal Zone, for the payment of rental of, and electric current consumed in, quarters hired to him by the Panama Canal since May 1, 1914, and requesting decision of two questions stated in the Auditor's memorandum, as follows:

1. Has the Panama Canal the right to withhold from Judge Jackson pay due him as district judge until the amount of his indebtedness for rental and electric current is paid by him?

2. Are the accounting and paying officers of the Panama Canal required under the law to withhold from Judge Jackson a sufficient portion of the pay due him as district judge to cover his indebtedness to the Panama Canal for rental and electric current?

The Auditor of the Panama Canal has approved an account against Judge Jackson and in favor of the United States as follows:

Debits.

Rent of house 118 Ancon from May 1 to Oct. 17, 1914—5 mo. 17 days, at $25. per mo.....	$139.17
Electric current, same period, at $5.55 per mo....	30.90

Rent of house 311 (old No. 115) Ancon, from Dec. 1, 1914, to Dec. 31, 1915, 13 mo. at $50 per mo..		650.00
Electric current, Dec. 1, 1914, to Dec. 31, 1915...		120.66
		$940.73
Credits.		
Pay roll deduction on Dec. 1914, roll....	$170.07	
Various payments March to June, 1914.	177.50	
		347.57
Balance due.....		$593.16

This office decided June 23, 1914, (69 M. S. Comp. Dec. 1704), that Judge Jackson was not entitled to occupy Government quarters rent free. (See also decision of December 28, 1914, 71 M. S. Comp. Dec. 1321).

In my decision of September 16, 1915, (74 M. S. Comp. Dec. 1081, the question presented was whether the paymaster of the Panama Canal was authorized to refund to Judge Jackson $170.07 deducted from his pay for the month of December, 1914, on account of house rent and electric current furnished him from May 1 to October 31, 1914, and it was held that if the amount deducted was the correct amount of the emoluments received by Judge Jackson in addition to his salary for the period from May 1 to October 31, 1914, refundment of the sum was not authorized.

The principle of this latter decision has application here. Judge Jackson is both a debtor and creditor of the Government and the right of the Government to set off one indebtedness against the other is recognized by numerous decisions of the accounting officers. This practice is an old one and is legal and proper without any express statute on the subject, and has been recognized by the Courts. (See Gratiot vs. United States, 15 Pet., 370; McKnight vs. United States, 98 U. S., 179; Bonnafon vs. United States, 14 Ct. Cls., 484; Taggart vs. United States, 17 Ct. Cls., 322; 21 Comp. Dec., 617.)

As there seems to have been some misunderstanding of the purpose and effect of the former decisions of this office, attention is called to the fact that there has been no decision that any amount should be withheld from the salary of Judge Jackson. It has been contended that the Comptroller of the Treasury had no authority to order a deduction from, or a withholding of, a part of the statutory compensation of an officer. Although the questions submitted by you have reference to with holding a part of the salary, they are answered on the basis of what amount the paymaster is authorized to pay to Judge Jackson.

23

In order that there may be no misunderstanding of what this office decides and the reasons therefor, and that there may be no occasion for a discussion of a lack of authority in the Comptroller to decide certain questions when no authority to decide them has been claimed or exercised by him, I have thought it best to explain the manner in which questions of the kind now submitted come before this office or the office of the Auditor for the War Department for decision. This is the purpose of the statement of the law and procedure which follows:

Under Section 8 of the act of July 31, 1894 (28 Stat. 208), the head of an executive department or independent establishment or a disbursing officer, may apply for a decision of the Comptroller upon any question involved in a payment to be made under the head of the department or establishment or by the disbursing officer. The authority of the latter to request an advance decision is limited to questions actually before him, where a voucher or pay roll has been presented to him for payment, while a decision can be rendered at the request of the head of a department on such questions and also on a question the decision of which may involve the contracting of an obligation rendering necessary a future payment.

In the present case the decision is requested by the Governor of the Panama Canal, who is the head of that establishment. This provision of law is for the purpose of preventing payments being made erroneously by disbursing officers, for which payments they would not receive

credit, or the incurring of unlawful obligations by departments. A decision that payment is not authorized by a disbursing officer, being made upon the statement of facts submitted by the head of a department or by the disbursing officer, is not in any way conclusive of the rights of the claimant. Such a decision does not affect the right of a claimant to present his claim with the evidence to the proper Auditor of the Treasury or the right to a revision by the Comptroller of the Auditor's action if it is desired. The adverse advance decision by the Comptroller has served its purpose of preventing the disbursing officer from making a doubtful payment and it does not control either as to the law or the facts when the claim comes before the Auditor

If the claim is one arising by law or under a contract, expressed or implied, and accrues within six years, the claimant may file a suit in the Court of Claims after action by the Auditor or Comptroller, or in most cases without submitting his claim for their action.

In the present case the quest on, as stated, is one involving the right of the Governor of the Panama Canal to direct a deduction to be made from the salary of an officer who is paid from Panama Canal appropriations. There is no specific statutory authority for the Comptroller of the Treasury to decide whether or not a deduction shall be made. He has specific authority and a duty in deciding the question whether the salary or any part thereof shall be paid. When he decides that it can not be paid by the disbursing officer because it involves controverted questions of law or fact, or for other reasons, it is the duty of the disbursing officer to refuse payment. The claimant then can present his claim to the proper Auditor of the Treasury, who will determine the state of the account between the officer and the United States and certify for payment such amount as is found due.

In the present case it appears from the copies of letters transmitted by you that Judge Jackson requested the renting to him as a residence of a house belonging to the United States and agreed in writing if the house he desired was rented to him, to pay the rent that had been specified

by the Governor of the Panama Canal, which rent he has failed and refused to pay. There is nothing in such circumstances that the Comptroller of the Treas-
24 ury can do under the law except to advise you that the paymaster is not authorized to pay the salary except such amount thereof as may be in excess of the claimed indebtedness.

The question as to whether or not the indebtedness is a proper charge against him can be decided, if he so desires, upon his filing a claim with the Auditor for the War Department for such part of his salary as is not paid to him by the paymaster of the Panama Canal.

This decision affects, therefore, only the question of whether the paymaster of the Panama Canal shall pay the salary, or have it paid at the Treasury after settlement of both sides of the account, and it being my opinion that the paymaster is not authorized to make payment under the circumstances indicating a clear case of contract indebtedness on the part of Judge Jackson to the United States, there is no question of deduction of salary to be decided.

I have stated this in order that it may be clearly understood that the right of Judge Jackson to salary will be decided in the first instance by the accounting officers of the Treasury, who will apply the usual rule of set-off to such indebtedness as they may find due. This action they will take under the authority of section 236, of the Revised Statutes, and of their conception of their duty in settling public accounts in which the Government is both creditor and debtor.

With a few exceptions there is no right by statute or otherwise in any person to have his salary paid by a disbursing officer. The requirement is any case that the questions involved in payment shall be settled at the Treasury before payment is not to be questioned because of the practice to pay undisputed salaries or other items in another way.

In reply to the two specific questions submitted, you are advised that if you are satisfied that Judge Jackson is indebted to the United States in the sum of $593.16, as

stated, or any other amount, payment of salary to the amount of the debt should not be made by the paymaster of the Panama Canal but the claimant should be left to submit claim for unpaid salary to the Auditor for the War Department or take such other action as he may elect. The same rule should be applied every month in the case of all persons indebted to the United States.

Respectfully,

W. W. WARWICK,
Comptroller.

(Sgd)
J. D. T. F.

EXHIBIT "G"

Treasury Department
Office of Comptroller
of the Treasury.

In replying quote initials L. R. C.

Washington,
April 11, 1916.

The Governor,
of the Panama Canal,
(Through Washington Office),
Washington, D. C.

Sir:

I have received your request of the 10th instant for decision as to whether part payment of Judge Jackson's salary may be made and collection of indebtedness spread over several months. The question relates to the decision of this office of March 23, 1916, in which it was held that payment by the Paymaster of The Panama
25 Canal of salary to the district judge of the Canal Zone was not authorized to the extent of his indebtedness to the Government.

In reply to your inquiry I can only say that the Comptroller has no authority further to extend the unauthorized credit heretofore given or to authorize a disbursing officer to make payment of salary to one clearly indebted to the Government.

Respectfully,

W. W. WARWICK,
Comptroller.

J. D. T. F.

EXHIBIT "H"

Department of Justice.
Washington

July 8, 1915.

The Honorable
The Secretary of War.

Sir:

I have the honor to acknowledge receipt of your letter of April 28, 1915, transmitting copy of a letter dated April 12, 1915, from the Governor of the Panama Canal, together with enclosures.

You request my opinion upon the following two questions presented by the Governor of the Panama Canal:

(1) Whether the United States District Attorney and the United States District Judge of the Canal Zone were, during the period from April 1, 1914, to March 1, 1915, entitled to the same privileges with respect to the occupancy of quarters as those enjoyed by other employees of the Panama Canal.

(2) Whether, in case the answer to the first question is in the negative, the Auditor of the Panama Canal is authorized to make the deductions from the payrolls covering money due the Government for rent of quarters and similar charges.

Taking up these questions in reverse order, without specific authority no portion of the salary of an officer of the United States may be withheld. See 20 Ops., 626 (1893); Benedict vs. United States, 176 U. S. 357 (1900). The only statute which has been cited as authorizing the Auditor to make the deductions in question is Section 8 of the Act of March 4, 1907 (34 Stat., 1371), which reads as follows:

All amounts due from employees, whether to the Commission, Panama Railroad Company, or contractor, for transportation, board, supplies, or for any other service,

are hereby authorized to be deducted from the compensation otherwise payable to the said employees, and to be paid to the authorized parties, or to be credited to the appropriation out of which the transportation, board, supplies, or other service was originally paid.

I am of the opinion, however, that the United States Attorney, the United States District Judge, and the United States Marshal, serving in the Canal Zone, are not "employees" within the meaning of this provision. Consequently, since there is no other statute authorizing the deductions, it must be held that the Auditor is without authority to make them.

26

From this answer to your second question, it follows that any claim which the Government may have against these officers for the occupancy of quarters during the period from April 1, 1914, to March 1, 1915, can only be enforced through proceedings in the Courts. Your first question, therefore, is one for judicial rather than administrative determination. (19 Ops., 670; 20 Ops., 618, 702, 714; 22 Ops., 181; 25 Ops., 97, 369, 543; 29 Ops., 226).

Of course, should you request that suit be instituted to enforce this claim, it would then be the duty of the Department to reach a conclusion as to whether grounds for such a suit exist.

Respectfully,

(Sgd) T. W. GREGORY,
Attorney General.

EXHIBIT "I"

Department of Justice
Office of the Attorney General.
Washington, D. C.
December 21, 1915.

The Honorable
The Secretary of War.

My dear Mr. Secretary:

In reply to your letter of October 30, 1915, relative to the liability of the United States Attorney and the United

States Marshal for the Canal Zone for payment of charges for rent of quarters, fuel and light, I have today sent a letter to the United States Attorney, copy of which I enclose, and a letter of similar tenor to the United States Marshal.

If these officials shall make due payment in compliance with my letter, I feel that it will be desirable that I should give no further formal opinion in the matter, unless you consider that such opinion is necessary.

Respectfully,

(sgd) T. W. GREGORY,
Attorney General.

EXHIBIT "I"

December 21, 1915.

Charles R. Williams, Esq.,
United States Attorney,
Ancon, Canal Zone.

Sir:

The Secretary of War has referred to me certain bills in favor of the United States against you for rent
27 and electric light from June 19, 1915, to September 30, 1915, aggregating $52.02, with a request that I institute suit upon the same.

He has also referred to me a letter signed jointly by yourself and by the United States Marshal, dated September 21, 1915, in which you state: "If, after the Secretary of War has ordered a suit brought, the Attorney General is of the opinion that we are liable, we desire to pay the charges in question without having the suit brought against us."

I have given this matter my very careful consideration, and am of the opinion that you are under legal liability to pay the amounts demanded.

As your letter indicates a willingness to abide by the views of this Department without suit, I request that you make prompt payment in the matter, and notify me,

in which event it will probably be unnecessary for me to give any formal opinion.

Respectfully,

(Sgd) T. W. GREGIRY,
Attorney General.

Indorsed: District Court, Canal Zone. Civil No. 107. William H. Jackson, Relator, vs. H. A. A. Smith, Auditor of the Panama Canal, Respondent. Respondent's Answer. Filed May 1, 1916, in the office of the Clerk of the District Court, Canal Zone.

(Sgd) E. M. GOOLSBY, Clerk.

AMENDED PETITION FOR WRIT OF MANDAMUS.

United States of America

Panama Canal.

In the District Court of the Canal Zone: Balboa Division.

William H. Jackson, Relator,
vs. No. 107 Civil.
H. A. A. Smith, Auditor of the Panama Canal, Respondent.

Amended Petition for Writ of Mandamus.

To the Honorable, The Judge of the District Court of the Canal Zone: Sitting in the Balboa Division:

The petition of William H. Jackson, of Ancon, Canal Zone, respectfully showeth:

28 First. That your petitioner is the duly appointed, qualified and acting Judge of the District Court of the Canal Zone, having been appointed thereto for a term of four years by the President of the United States, and having been confirmed by the Senate of the United States, and thereafter, to-wit, on

the first day of May, 1914, was duly sworn and assumed the duties of his office.

Second. That pursuant to the Act of Congress, approved August 24, 1912, also known as the "Panama Canal Act", it was provided that the District Judge of the Canal Zone "shall receive the same salary paid to the District Judges of the United States, that is to say, the sum of $6,000.00, United States currency per annum, payable in monthly installments of $500.00, each.

Third. That the Congress of the United States has heretofore appropriated funds for the payment of the salary of your petitioner, and has appropriated funds for salaries and expenses necessary for the civil government of the Canal Zone, including the expenses of your petitioner herein while engaged in the performance of his official duties, and that the funds appropriated as aforesaid, are now available for the payment of said salary and expenses.

Fourth. That H. A. A. Smith, the above named respondent, is now, and was at all times hereinafter mentioned, the duly appointed, qualified and acting Auditor of the Panama Canal, and as such it was his legal duty, among other things, to audit, issue and deliver to your petitioner each month, the warrant, voucher or paycheck for the payment of the monthly salary due to your petitioner, and to approve, audit and issue the said warrant, voucher or paycheck in such form and manner that your petitioner might collect and receive the cash thereon from the Paymaster of the Panama Canal out of the funds appropriated by the Congress as aforesaid.

Fifth: That during the month of December, 1914, your petitioner well and truly performed his duties as Judge of the said District Court of the Canal Zone, and upon the termination of said month became and was entitled to receive the warrant, voucher or paycheck for the payment of his monthly salary in the full sum of $500.00,

United States currency, and it became and was
29 the legal duty of the said H. A. A. Smith, Auditor of the Panama Canal, to audit, approve and issue the said warrant, voucher or paycheck, and cause the same to be delivered unto your petitioner.

Sixth. That notwithstanding the fact your petitioner was legally entitled to receive the said warrant, voucher or paycheck for the full sum of $500.00, United States currency, in payment of his monthly salary for the month of December, 1914, at the termination of said month, and that it is and was the legal duty of the said H. A. A. Smith, Auditor of the Panama Canal, to audit, issue and deliver to your petitioner the said warrant, voucher or paycheck for the full sum of $500.00 United States currency, the said H. A. A. Smith, Auditor as aforesaid, failed and refused, and still fails and refuses to audit, issue and deliver to your petitioner, the said warrant, voucher or paycheck for the full amount of the monthly salary due him for the month of December, 1914, and has unlawfully withheld and still withholds from the amount due your petitioner, the sum of $170.07, to secure the payment of an alleged indebtedness, which the said H. A. A. Smith, Auditor of the Panama Canal, unlawfully claimed and pretended, and still claims and pretends is due from your petitioner unto the Panama Canal or to the United States Government. That although your petitioner has demanded the issuance and delivery of the said warrant, voucher or paycheck covering the sum of $170.07, unlawfully withheld as aforesaid, the said H. A. A. Smith, Auditor of the Panama Canal, has failed and refused and still fails and refuses so to do.

Seventh. That during the month of March, 1916, your petitioner well and truly performed his duties as Judge of the District Court of the Canal Zone, and upon the termination of said month became and was entitled to receive the warrant, voucher or paycheck for the payment of his monthly salary in the full sum of $500.00 United States currency, and it became and was the legal duty

of the said H. A. A. Smith, Auditor of the Panama Canal, to audit and issue the said warrant, voucher or pay-check and cause the same to be delivered to your petitioner. That notwithstanding the fact your petitioner, was, and is legally entitled to receive the warrant, voucher or pay-check for the full sum of $500.00, United States currency, in payment of his monthly salary for the month of March, 1916, and that it was, and is the legal duty of the said H. A. A. Smith, Auditor of the Panama Canal, to audit, issue and deliver to your petitioner the said warrant, voucher or pay-check for the full sum of $500.00, United States currency, the said H. A. A. Smith, Auditor as aforesaid, has failed and refused, and still fails and refuses to audit, issue and deliver to your petitioner the said warrant, voucher or paycheck for the full sum of $500.00, United States currency, and is unlawfully withholding the same from your petitioner to secure the payment of an alleged indebtedness, which the said H. A. A. Smith, as Auditor of the Panama Canal, unlawfully claims and pretends is due from your petitioner unto the Panama Canal or to the United States Government; and, although, your petitioner has made due demand, the said H. A. A. Smith, Auditor of the Panama Canal, has failed and refused, and still fails and refuses to issue and deliver to your petitioner the said warrant, voucher or pay-check, as it is his legal duty so to do.

Eighth. That during the month of April, 1916, your petitioner well and truly performed his duties as Judge of the District Court of the Canal Zone, and upon the termination of said month became and was entitled to receive the warrant, voucher or pay-check for the payment of his monthly salary in the full sum of $500.00, United States currency, and it became and was the legal duty of the said H. A. A. Smith, Auditor of the Panama Canal, to audit, approve and issue the said warrant, voucher or paycheck for the full sum of $500.00, United States currency, and cause the same to be delivered unto your petitioner.

Ninth. That notwithstanding the fact your petitioner was legally entitled to receive the said warrant, voucher or

paycheck for the full sum of $500.00, United States currency in payment of his monthly salary for the month of April, 1916, and that it was and is the legal duty of the said H. A. A. Smith, Auditor of the Panama Canal, to audit, approve, issue and deliver to your petitioner the said warrant, voucher or paycheck for the full sum of $500.00, United States currency, the said H. A. A. Smith, Auditor of the Panama Canal, has failed and refused and still fails and refuses to audit, issue amd deliver to your petitioner the said warrant, voucher or paycheck for the full amount of the salary due to your petitioner
31 for the month of April, 1916, and has unlawfully withheld and still withholds from the amount due to your petitioner, the sum of $341.97, United States currency, to secure the payment of an alleged indebtedness, which the said H. A. A. Smith, Auditor as aforesaid, unlawfully and wilfully claims and pretends is due from your petitioner unto the Panama Canal or to the United States Government; and, although, your petitioner has demanded the issuance and delivery of the said warrant, voucher or paycheck covering the said sum of $341.97, United States currency, unlawfully withheld as aforesaid, the said H. A. A. Smith, Auditor of the Panama Canal, has failed and refused, and still fails and refuses to issue and deliver to your petitioner the said warrant, voucher or paycheck, as it is his legal duty so to do.

Tenth. And your petitioner further avers that he is not indebted unto the Panama Canal or to the United States Government, in any sum or sums whatsoever, nor was he so indebted in the month of December, 1914, in the month of March, 1916, in the month of April, 1916, nor at any time prior or subsequent thereto, and that there is no judgment, lien or lawful order of any kind or character whatsoever, whereby or wherein the said warrants, vouchers or paychecks in payment of the monthly salary due to your petitioner may lawfully be withheld from your petitioner by the said H. A. A. Smith, Auditor of the Panama Canal, to secure or satisfy any alleged or pretended

indebtedness due from your petitioner unto the Panama Canal or to the United States Government.

Eleventh: That the action of the said H. A. A. Smith, Auditor of the Panama Canal, in withholding the issuance and delivery to your petitioner the warrants, vouchers or pay checks for the payment of the salary due as hereinbefore set forth, tends to, and does deprive your petitioner of rights, privileges and immunities guaranteed and preserved to him under the Constitution of the United States, under the laws of the United States, and under the laws of the Canal Zone.

Twelfth. Your petitioner further avers that the action of the said H. A. A. Smith, Auditor of the Panama Canal, in failing and refusing to audit, approve, issue and deliver to your petitioner, the warrants, vouchers and paychecks for services performed by your petitioner in the
32 discharge of his official duties as Judge of the District Court of the Canal Zone, tends to, and does deprive your petitioner of his property without due process of law.

Thirteenth. Your petitioner further alleges that there is no other plain, speedy or adequate remedy by which his rights, privileges, immunities and property may be protected and preserved, save that a writ of mandamus issue out of this Honorable Court, directed to the said H. A. A. Smith, Auditor of the Panama Canal, commanding him, the said H. A. A. Smith, Auditor of the Panama Canal, to audit, approve, issue and deliver unto your petitioner, the warrants, vouchers or paychecks in the sums of $170.07, $500.00, and $341.97, United States currency, respectively, in payment for the services rendered by your petitioner as Judge of the District Court of the Canal Zone, during the months of December, 1914, March, 1915, and April, 1916.

Wherefore, your petitioner being without remedy other than that sought herein, respectfully prays that a peremptory Writ of Mandamus issue out of this Court directed to the said H. A. A. Smith, Auditor of the Panama

Canal, commanding him as such Auditor of the Panama Canal, to audit, approve, issue and deliver unto your petitioner, the warrants, vouchers or paychecks for the said amounts or sum of $170.07, $500.00, and $341.97, United States currency, and to do and perform such other acts and things in the premises as may be necessary and proper to the relief herein prayed.

And your petitioner further prays all such other and further, or different relief in the premises as may be deemed just and proper and as the exigencies of the case may require. (Sgd) WM. C. MACINTYRE,
(Sgd) C. P. FAIRMAN,
Solicitors for Wm. H. Jackson, Relator.

United States of America,
Canal Zone,
Balboa Division. ss

William H. Jackson, of lawful age, being first duly sworn according to law, on oath states:

That he is the petitioner named in the above
33 and foregoing Amended Petition for Writ of Mandamus; that he has read the same and knows the contents thereof, and that the facts therein set forth and alleged are true, save as to matters herein alleged upon information and belief, and as to such he verily believes them to be true.

(Sgd) WILLIAM H. JACKSON,

Subscribed and sworn to before me this 8th day of May, 1916.

(Sgd) E. M. GOOLSBY,
[Seal] Clerk of the District Court.

Indorsed: Filed May 8th, 1916, in the office of the Clerk of the District Court, Canal Zone. (Sgd) E. M. Goolsby, Clerk,

Marshal's Return. A copy of the within petition was delivered to H. A. A. Smith, at Balboa Heights on May 8, 1916 by me. JOHN H. POOLE,
(Sgd) Deputy Marshal.

RESPONDENT'S ANSWER TO AMENDED PETITION.

United States of America

Panama Canal

In the District Court in and for the Division of Balboa, Canal Zone.

William H. Jackson, Relator,
vs. Number 107 Civil.
H. A. A. Smith, Auditor of The Panama Canal, Respondent.

Answer to Amended Petition for writ of Mandamus.

Now comes the respondent, H. A. A. Smith, Auditor of The Panama Canal, by his counsel, Charles R. Williams, District Attorney of the Canal Zone, and for answer to the Amended Petition for Writ of Mandamus says:

First: Respondent says that the allegations of the Amended Petition for Writ of Mandamus, except those contained in paragraphs third, eighth, and ninth, are identical with the allegations of relator's original petition, and respondent adopts as his answer to said amended petition the answer heretofore made and filed to relator's original petition.

34 Second: Respondent admits the allegations of paragraph third of said Amended Petition, but says that the funds appropriated for relator's expenses while engaged in the performance of relator's official duties relate to and are applicable only to the necessary personal expenses of relator while holding Court in the Christobal Division of the District Court.

Third: Answering said paragraphs eighth and ninth of relator's Amended Petition, respondent denies that relator was entitled to a full month's salary of $500.00

for the month of April, 1916, but admits that relator was entitled to the sum of $483.33 as salary for said month. Further answering, respondent shows that relator was absent on vacation from the Canal Zone on April 21st, 22nd, and 23rd, and that said vacation was not the annual six week's vacation nor a part thereof allowed by law to said relator; and that of said period of three days two days were legal holidays and salary therefor was not deducted and withheld from relator's salary, but that one days' salary, to-wit, that of April 22, 1916, amounting to $16.67, has been deducted from relator's salary in compliance with the decision of the Comptroller of the Treasury of the United States of April 6, 1915, which decision was rendered upon request of the Governor of The Panama Canal, as provided for by law, and a copy of which is hereto attached and marked Exhibit "No. 1."

Fourth: Further answering said paragraphs eighth and ninth, respondent says that the sum of $341.97, referred to in said paragraphs and alleged to be unlawfully withheld from relator's salary for the month of April, 1916, is made up of the sum of $16.67, referred to in the foregoing paragraph third, and of the sum of $325.30, the latter sum being the balance due the United States and The Panama Canal, as shown by Exhibit "A", attached to the original answer of respondent, after crediting thereon the sum of $500.00 of relator's salary for the month of March, 1916.

Fifth: Further answering, respondent says that the said sum of $341.97 has been withheld and deducted from relator's salary in compliance with the orders of the Comptroller of the Treasury of the United States, and for the reasons fully set forth in respondent's answer
35 to original petition.

(sgd) CHARLES R. WILLIAMS,
District Attorney of the Canal Zone, Counsel for Respondent.

Personally appeared before the undersigned authority, H. A. A. Smith, who on oath deposes and says that he is

the Auditor of The Panama Canal and respondent in the above Amended Petition for Writ of Mandamus, and that the facts stated in the foregoing answer are true.

(sgd) H. A. A. SMITH,
Auditor, The Panama Canal.

Subscribed and sworn to before me this May 27, 1916.

(sgd) E. M. GOOLSBY,
Clerk, District Court.

"EXHIBIT NO. 1.'

Treasury Department
Washington, April 6, 1915.

Office of Comptroller
of the Treasury.
In replying quote initials N M.

The Governor of the
Panama Canal.

Sir:

I have your letter of the 22nd ultimo as follows:

"Sec 8 of the Panama Canal Act (37 Stat., 565) provides for the appointment of the District Judge of the Canal Zone. It also provides that the District Judge shall receive the same salary paid to district judges of the United States, and that,

'The district judge shall be entitled to six weeks' leave of absence each year with pay. During his absence or during any period of disability or disqualification from sickness or otherwise to discharge his duties the same shall be temporarily performed by any circuit or district judge of the United States who may be designated by the President.'

"Your decision is requested as to whether the District Judge is entitled to pay for any period in excess of six weeks during which he may be either absent from the Canal Zone on leave of absence or be disabled or disqualified from sickness or otherwise to discharge his duties.

"You are also requested to decide whether the 'year' mentioned refers to the calendar year, or the service year dating from the appointment of the Judge; and also whether the leave of the district judge may be postponed so that he may take two periods of six weeks each within a service or calendar year as the case may be."

The section cited provides for a district Court in the Canal Zone and for a district judge who shall hold said Court, and who is required by the section to reside within the Canal Zone during his term of office. The purpose and effect of the first part of the provision you
36 quote is to permit an annual absence of six weeks from the Zone without forfeiture of pay, and to limit such absence to the said period of six weeks. Any absence from the Zone beyond this statutory period must be without pay.

The remainder of the provision merely provides for the performance of the judicial duties during the judge's absence, disability or disqualification. The statute does not deny or limit pay for the period of disability or disqualification unless accompanied by absence from the Canal Zone.

Leave of absence of employees of the Canal are based by regulation upon a service year. This office has held, however, that this judge, and the attorney and marshal are not employees of the Canal, nor part of the Canal organization; but are statutory officers with a status as to compensation and allowance dependant upon statutory provision (Decision of June 23, 1914, 69 M. S. Comp. Dec., 1704).

The word year when used without a qualifying adjective is generally understood to mean the calendar year unless the context indicates a contrary intent. In this case the judge's term of office is fixed at four years. These four years are service years and the provision for leave of absence appearing in the same statute must be construed as relating to the years fixed by the conditions of the judge's tenure of office, which are service years.

The judge is limited each year to six weeks' absence with pay, to be taken at any time during the year, and may not draw pay for absence in excess of that period in any one service year. If not taken in one year the leave of absence cannot be carried over into another year.

Respectfully,
GEO. E. DOWNEY,
Comptroller.

J. D. T. W.

Indorsed: Filed May 27, 1916, in the office of the Clerk of the District Court, Canal Zone. (Sgd.) E. M. Goolsby, Clerk.

REPLY TO THE ANSWERS OF THE RESPONDENT.

United States of America,
Panama Canal.

In the District Court of the Canal Zone: Balboa Division

William H. Jackson, Relator,
vs. No. 107 Civil.
H. A. A. Smith, Auditor of the Panama Canal, Respondent.

Reply to the Answers of the Respondent.

For reply to the answer of the Respondent,
37 H. A. Smith, Auditor of the Panama Canal, heretofore filed in the above entitled cause, the Relator herein respectfully states, alleges and showeth as follows:

First: That as to the allegations and statements set forth and contained in the Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth and Fourteenth paragraphs of the Respondent, wherein the said Respondent seeks to explain, traverse or avoid, in whole or in part the allegations set forth and contained in the petition

for writ of mandamus, the Relator denies each and every allegation and statement therein set forth which has the effect of and in substance does explain, traverse, avoid or deny all or any part of the allegations in said petition, excepting such as may hereinafter be specifically admitted.

Second. The Relator specifically denies the allegations and statements set forth in the Fifth paragraph of the answer of the Respondent.

Third. The Relator specifically denies the allegations and statements set forth in the Sixth paragraph of the answer of the Respondent.

Fourth: The Relator specifically denies the allegations and statements set forth in the Seventh Paragraph of the answer of the Respondent, and the Relator further avers that the acts of the said Respondent pursuant to the right and authority alleged in the said Seventh paragraph, are in fact and effect a final adjudication and settlement of an alleged and disputed account in the chambers of an executive officer, without a trial, without a judge or jury, without examining witnesses, and without hearing counsel.

Fifth. The Relator specifically denies the allegations and statements set forth in the Eighth paragraph of the answer of the Respondent.

Sixth. The Relator specifically denies the allegations and statements set forth in the Ninth paragraph of the answer of the Respondent.

Seventh. The Relator admits writing the letter dated September 25, 1914, addressed to the Chief Quartermaster, together with other correspondence annexed to the answer of the Respondent as Exhibit "B", but denies each and every other allegation and statement set forth in the Tenth Paragraph of the said answer, and in particular, the Relator denies that he specifically agreed to pay a rental
38 of fifty dollars per month for House No. 311, Ancon, or any other sum, excepting in the manner and under the conditions hereinafter set forth.

Further replying to the allegations set forth in the Tenth paragraph of the answer of the Respondent, the Relator alleges that the said letter dated September 25, 1916, and all other correspondence annexed to the said answer as Exhibit "B", was written pursuant to a personal conversation had with the then Chief Quartermaster of the Panama Canal, and solely in view of the immediate prospective changes and status of the officers and employees of the Government and the Panama Canal, which was at the time under the consideration and in contemplation of the President of the United States under the authority and the provisions of the Panama Canal Act of August 24, 1912, by virtue of which, at an early date to be fixed, all officers and employees of the United States and the Panama Canal, would thereafter be subjected to rent and other charges for the use and occupation of quarters assigned to them and for fuel and electric lights to be furnished to them; that the said letter dated September 25, 1914, and all other correspondence relating thereto, was never intended, treated or considered by the Relator, the then Chief Quartermaster and his successors in office, or any other officer of the Government and the Panama Canal, as forming the basis of any contract of rental, excepting at and during such times as by virtue of the Executive Order of the President of the United States, under the authority of the Panama Canal Act, all officers and employees of the Government and the Panama Canal, residing within the Canal Zone, should be required to pay the rent and other charges fixed thereby.

And the Relator further alleges that under date of January 15, 1915, effective March 1, 1915, the President of the United States pursuant to the provisions of the said Panama Canal Act, did issue his Executive Order, whereby the officers and employees of the Government and the Panama Canal, assigned to quarters and residing within the Canal Zone, were subjected to charges for rent, fuel and electric lights, and that thereafter, and until the suspension of the operations of the said Executive Order, to-wit: during the months of March, April and May, 1915, the Relator voluntarily complied with the provisions thereof, and paid all charges

assessed against for and on account of the rent of the house assigned to him and the fuel and electric light furnished.

And the Relator further alleges, that the Ex-
39 ecutive Order of the President of the United States, issued January 15, 1915, to be effective March 1, 1915, was, by authority of the President, thereafter suspended from operation and effect, within the Canal Zone, by virtue of the subsequent Executive Order of the President dated May 25, 1915, and that since the rescission and suspension of the operation of the said Executive Order, dated January 15, 1915, no legal authority has or can be exercised by executive official of the Government or the Panama Canal, to charge or collect from the officers and employees of the United States and the Panama Canal, including the Relator herein, for or on account of rent for quarters assigned to them, and the fuel and electric lights furnished to them; and the Relator further alleges, that prior and subsequent to the months of March, April and May, 1915, there was no lawful authority delegated to or that could be exercised by any executive officer of the Government and the Panama Canal, whereby officers and employees of the United States and the Panama Canal, in the use and occupation of the quarters assigned to them, could be charged for the rental thereof, for fuel and electric light furnished to them, or other charges not previously and specifically established by law, order, rule or regulation.

Eighth. The Relator specifically denies the allegations and statements set forth in the Eleventh paragraph of the answer of the Respondent, except as hereinafter admitted and set forth.

Further replying to the allegations set forth in the said Eleventh paragraph, the Relator alleges that under date of April 28, 1915, the Secretary of War, transmitting a letter and request of the Governor of the Panama Canal, dated April 12, 1915, requested the opinion of the Attorney General of the United States upon the questions submitted, and thereafter the Attorney General rendered his opinion

upon the said questions, which said opinion is in words and figures following:

"Department of Justice."
Washington, July 8, 1915.

40 The Honorable
The Secretary of War.

Sir:

"I have the honor to acknowledge receipt of your letter of April 28, 1915, transmitting a copy of a letter dated April 12, 1915, from the Governor of the Panama Canal, together with enclosures.

You request my opinion upon the following two questions presented by the Governor of the Panama Canal:

(1) Whether the United States District Attorney and the United States District Judge of the Canal Zone were, during the period from April 1, 1914, to Mar. 1, 1915, entitled to the same privileges with respect to the occupancy of quarters as those enjoyed by other employees of the Panama Canal.

(2) Whether, in case the answer to the first question is in the negative, the Auditor of the Panama Canal is authorized to make deductions from the payrolls covering money due the Government for rent of quarters and similar charges.

Taking up these questions in reverse order, without specific authority no portion of the salary of an officer of the United States may be withheld. See 20 Ops. 626 (1893); Benedict v. United States, 176 U. S., 357 (1900). The only statute which has been cited as authorizing the Auditor to make deductions in question is Section 8 of the Act of March 4, 1907, (34 Stat., 1371), which reads as follows:

"All amounts due from employees, whether to the Commission, Panama Railroad Company, or contractor, for transportation, board, supplies, or for any other service,

are hereby authorized to be deducted from the compensation otherwise payable to the said employees, and to be paid, to the authorized parties, or to be credited to the appropriation out of which the transportation, board, supplies or other service was originally paid."

I am of the opinion, however, that the United States Attorney, the United States District Judge, and the United States Marshal, serving in the Canal Zone, are not "employees" within the meaning of this provision. Consequently, since there is no other statute authorizing the deduction, it must be held that the Auditor is without authority to make them.

From this answer to your second question, it follows that any claim which the Government may have against these officers for the occupancy of quarters during the period from April 1, 1914, to March 1, 1915, can only be enforced through proceedings in the Courts. Your first question, therefore, is one for judicial rather than administrative determination. 19 Ops. 670; 20 Ops. 618, 702, 714; 22 Ops. 181; 25 Ops. 97, 369, 543; 29 Ops. 226.)

Of course, should you request that suit be instituted to enforce this claim, it would then be the duty of the Department to reach a conclusion as to whether grounds for such a suit exist.

Respectfully,

(Signed) T. W. GREGORY,
Attorney General."

Ninth: In reply to the allegations and statements set forth in the Twelfth paragraph of the answer of the Respondent, the Relator denies that the deductions and withholding of the sums mentioned therein, was made under the decisions and authority of the Comptroller of the Treasury, or any other legal authority.

41 Tenth: The Relator specifically denies the allegations and statements set forth in the Thirteenth paragraph of the answer of the Respondent.

Eleventh: The Relator specifically denies the allegations and statements set forth in the Fourteenth paragraph of the answer of the Respondent.

For reply to the answer of the Respondent to the amended petition of the Relator for writ of mandamus, the Relator respectfully represents and shows unto this honorable Court as follows:

First: The Relator admits that out of the funds appropriated for the civil government of the Canal Zone, he is entitled to be paid his necessary personal expenses in the performance of his official duties, and further replying to the allegations set forth in the second paragraph of the answer of the Respondent, the Relator avers that the said Respondent has failed and refused to allow and pay to him the necessary, actual personal expenses incurred in the peformance of his duties, and has limited the Relator to the sum of Thirty (30 cts) in payment for his meals while absent from home.

Second. Except as hereinafter specifically admitted, the Relator denies each and every allegation and statement set forth in the Third paragraph of the answer of the Respondent to the amended petition for writ of mandamus.

The Relator admits that he was absent on April 21, 22, and 23, and that April 21 and 23, were legal holidays, and your Relator avers that April 20, 1916, was a legal holiday, and that owing to the necessities and exigencies of a suit on trial in the Christobal Division, he was compelled to hold a session of Court on the said date of April 20, 1916.

And the Relator further alleges that the District Judge of the Canal Zone, is administratively under the Department of Justice and that the entire office of the United States District Court of the Canal Zone, is in the judicial service of the United States, and that the Respondent has no legal right, power or authority, under the decisions of the Comptroller of the Treasury of the United States

or otherwise, to deduct or withhold from the Re-
42 lator any part or all of his monthly salary, in payment of any alleged indebtedness owing the Government and the Panama Canal, or on account of his absence and failure to daily report to the timekeeping department of the Panama Canal, or for any other cause or reason whatsoever.

The Relator specifically denies the allegations and statements set forth in the Fourth paragraph of the answer of the Respondent to the amended petition for writ of mandamus.

Fourth. The Relator denies that the sum of $341.97, has been withheld and deducted from his salary for the month of April, 1916, in compliance with the orders of the Comptroller of the Treasury, or the lawful orders of any other officer of the United States and the Panama Canal, as set forth in the Fifth paragraph of the answer of the Respondent to the amended petition for writ of mandamus.

Wherefore, having fully replied to the allegations set forth in the answer of the Respondent to the petition of the Relator, and the answer of the Respondent to the amended petition for writ of mandamus, the Relator prays that the said answers be dismissed and for naught held, and that the relief prayed in the amended petition be granted in the manner conformable to the law and as the exigencies of the case shall require.

(sgd) C. P. FAIRMAN,
(sgd) WM. C. MACINTYRE,
Solicitors for Relator.

United States of America,
Panama Canal.
Balboa Division. ss.

William H. Jackson, of lawful age, being first duly sworn according to law, on his oath deposes and says; that he is the petitioner in the above entitled cause; that he has read the above and foregoing reply to the answer of

the Respondent, together with the answer of the Respondent to the amended petition for writ of mandamus, and knows the contents thereof, and that the facts therein set forth and alleged are true, save as to matters therein alleged upon information and belief, and as to such he verily believes them to be true.

(Sgd) WILLIAM H. JACKSON,
Affiant-Petitioner.

Subscribed and sworn to before me this 5th day of June, 1916.

[Seal] E. M. GOOLSBY,
Clerk of the District Court.

Filed Jun. 5, 1916, in the office of the Clerk
43 of the District Court, Canal Zone.
(sgd) E. M. GOOLSBY, Clerk.

AMENDMENT AND SUPPLEMENT TO THE AMENDED PETITION FOR MANDAMUS.

United States of America.
Panama Canal.

In the District Court of the Canal Zone; Balboa Division.

William H. Jackson, Relator.
vs. Number 107 Civil.
H. A. A. Smith, Auditor of the Panama Canal, Respondent.

Amendment and Supplement to the Amended Petition for Writ of Mandamus.

To the Honorable; the Judge of the District Court of the Canal Zone; sitting in the Balboa Division:

And now comes the above named Relator, William H. Jackson, and for amendment to and supplemental of the Amended petition for writ of mandamus heretofore

filed in the above entitled cause, respectfully represents and showeth unto this honorable Court as follows:

First. That heretofore, to-wit: as of the April and May terms the Relator filed herein his original and amended petition for writ of mandamus and that the above named Respondent has filed answer thereto; that it appears from the answer of the said Respondent to the amended petition, that a part of the sum unlawfully withheld and deducted from the salary of the Relator for the month of April, 1916, was by reason of the absence or failure on the
44 part of the Relator to report to the timekeeping department of the Panama Canal, on the 22d day of April, 1916, and that the said sum was withheld and deducted under the authority of the decisions of the Comptroller of the Treasury of the United States, the legal right, power or authority of the said Respondent to withhold or deduct all or any part of the salary appropriated by Congress on account of the absence or failure to report to the timekeeping department of the Panama Canal, being denied in the reply of the Relator to the answer of the said Respondent in order that the validity of prior acts of said Respondent in this respect may be determined, and as an amendment to the amended petition filed herein, the Relator alleges:

Second. That upon the termination of the month of January, 1916, it became and was the legal duty of the Respondent, H. A. A. Smith, Auditor of the Panama Canal, to audit, issue, approve and deliver to the Relator, the warrant, voucher or paycheck for the full sum of $500.00, United States currency, in payment of his monthly salary for the said month of January, 1916, and although it was his legal duty so to do, the said Respondent neglected, failed and refused to issue and deliver the same, and unlawfully withheld and deducted therefrom the sum of $66.66, which said sum as the Relator has been informed and believes, was withheld and deducted by reason and on account of the absence or failure of the Relator to report to the timekeeping department of the Panama Canal, for a

period of four days during the said month of January, 1916.

Third. Supplemental to the amended petition filed herein and with respect to acts of the said Respondent since the date of filing thereof, the Relator further alleges:

That during the month of May, 1916, your petitioner well and truly performed his duties as Judge of the District Court of the Canal Zone, and upon the termination of said month became and was entitled to receive the warrant, voucher or paycheck for the payment of his monthly salary in the full sum of $500.00, United States currency, and it became and was the legal duty of the said H. A. A. Smith, Auditor of the Panama Canal, to audit and issue the said warrant, voucher or paycheck and cause
45 the same to be delivered to your petitioner. That notwithstanding your petitioner was legally entitled to receive the warrant, voucher or paycheck for the full sum of $500.00, in payment of his monthly salary for the month of May, 1916, and that it was, and is the legal duty of the said H. A. A. Smith, Auditor of the Panama Canal, to audit, issue and deliver to your petitioner the said warrant, voucher or paycheck for the said sum of $500.00, the said H. A. A. Smith, Auditor as aforesaid, has failed and refused, and still fails and refuses to audit, issue and deliver to your petitioner the said warrant, voucher or paycheck in payment of his salary for the month of May, 1916, and has unlawfully withheld and still withholds from the amount due your petitioner, the sum of $53.06, United States curency, to secure the payment of an alleged indebtedness, which the said H. A. A. Smith, Auditor as aforesaid, unlawfully and wilfully claims and pretends is owing by your petitioner unto the Panama Canal or to the United States Government; and, although, your petitioner has demanded the issuance and delivery of the said warrant, voucher or paycheck covering the said sum of $53.06, the said H. A. A. Smith, Auditor of the Panama Canal, has failed and refused and still fails and refuses to issue and deliver the same unto your petitioner, as it is his legal duty so to do.

Wherefore, your petitioner prays that in addition to the relief sought and prayed in the amended petition filed herein, a peremptory Writ of Mandamus issue out of this Court directed to the said H. A. A. Smith, Auditor of the Panama Canal, commanding him as such Auditor of the Panama Canal, to audit, issue and deliver unto your petitioner, the warrant, vouchers or paychecks in the said amounts and sum of $66.66 and $53.06, United States currency, and to do and perform such other acts and things in the premises as may be necessary and proper for the relief herein prayed.

(Sgd.) C. P. FAIRMAN, Solicitor.

46 United States of America,
Panama Canal,
Balboa Division, s. s.

William H. Jackson, of lawful age being first duly sworn deposes and says, that he is the Relator in the above entitled cause, that he has read the above and foregoing amendment and supplement to the amended petition filed therein and is acquainted with the contents thereof; that the allegations therein set forth are true, excepting as to those stated upon information and belief and as to such he verily believes them to be true.

(Sgd). WILLIAM H. JACKSON,
Relator-Affiant.

Subscribed and sworn to before me this 9th day of June, 1916.

[Seal] E. M. GOOLSBY,
(Signed) Clerk of the District Court.

Ancon, C. Z. June 9, 1916.

A copy of this pleading was delivered by me, today, to H. A. A. Smith, at Balboa Heights, C. Z.

(Sgd.) JOHN H. POOLE,
Deputy Marshal.

Filed June 9, 1916, in the office of the Clerk of the District Court, Canal Zone.

(Sgd.) E. M. GOOLSBY, Clerk.

ANSWER OF RESPONDENT TO THE AMENDMENT AND SUPPLEMENT TO THE AMENDED PETITION FOR WRIT OF MANDAMUS.

United States of America.

Panama Canal.

In the District Court in and for the Division of Balboa, Canal Zone.

William H. Jackson, Relator,

vs. No. 107 Civil.

H. A. A. Smith, Auditor of the Panama Canal, Respondent.

Answer of Respondent to the Amendment and Supplement of the Amended Petition for Writ of Mandamus.

47 Now comes the respondent H. A. A. Smith, Auditor of the Panama Canal, by his counsel, Charles R. Williams, District Attorney of the Canal Zone, and for answer to the Amendment and Supplement to the Amended Petition for Writ of Mandamus, says:

First: Respondent says that in his answer to the original petition and in his answer to amended petition, heretofore filed, respondent has fully answered all allegations contained in the said Amendment and Supplement to said Amended Petition for Writ of Mandamus, except as hereinafter answered, and respondent adopts as his answer to said Amendment and Supplement the answers heretofore made.

Second: Respondent shows that relator in the year 1915 exercised his right to the six weeks' vacation allowed to the District Judge of the Canal Zone under the Panama Canal Act, approved August 24, 1912; but that relator did not return to the Canal Zone and to the discharge of his

duties as District Judge until January 3, 1916, whereas the six weeks' period of vacation expired on the 28th day of December, 1915, and that respondent, in compliance with the decision of the Comptroller of the Treasury, declined to approve for payment the amount of salary for said period, amounting to the sum of $66.66. Respondent shows that the decision and order of the Comptroller of the Treasury referred to is attached as Exhibit 1 to respondent's answer to relator's amended petition.

Third. Further answering, respondent shows that in compliance with the decisions of the Comptroller of the Treasury, heretofore referred to, respondent declined to approve for payment relator's entire salary for the month of May, 1916, for the reason that relator failed and refused to pay the sum of $50.00, monthly rental of a house and residence occupied by relator, and failed and refused to pay charges for electric current furnished relator during the month of April, 1916, amounting to $5.06.

Respondent further shows that the hospital bill of relator, amounting to the sum of $2.00, referred to in respondent's answer to amended petition, was paid by relator on May 25, 1916, and that the sum of $53.06, referred to in the third paragraph of relator's Amendment and Supplement to Amended Petition, is arrived at by crediting
48 said payment of $2.00 upon the amount of charges for rent and electric current furnished.

Fourth: Respondent, further answering, says that respondent in his refusal to approve for payment to relator the said sums of $66.66 and $53.06, was acting in compliance with the decisions and orders of the Comptroller of the Treasury of the United States, as set forth, in answer to original petition and in answer to amended petition, and denies that relator is entitled to relief prayed for; and respondent, having fully answered, prays to be hence discharged.

(Sgd.) CHARLES R. WILLIAMS,
Attorney for Respondent.

Personally appeared before the undersigned authority, H. A. A. Smith, who on oath deposes and says that he is the Auditor of The Panama Canal and respondent in the above Amendment and Supplement to the Amended Petition for Writ of Mandamus, and that the facts stated in the foregoing answer are true.

(sgd) H. A. A. SMITH,
Auditor of The Panama Canal.

Subscribed and sworn to before me this June 12th, 1916.

(sgd) E. M. GOOLSBY,
[Seal] Clerk, District Court.

Filed for record Jun. 12, 1916, in the office of the Clerk of the District Court, Canal Zone.

(sgd) E. M. GOOLSBY, Clerk.

DEMURRER

United States of America.

Panama Canal.

In the District Court in and for the Division of Balboa, Canal Zone.

William H. Jackson, Relator,
vs. Number 107 Civil.
H. A. A. Smith, Auditor of the Panama Canal.

Demurrer

49 Now comes respondent, by his counsel, Charles R. Williams, and demurs to the pleadings filed by relator on June 5, 1916, and styled "Reply to the Answers of Respondent", on the ground that the laws of the Canal Zone and of the United States of America make no provision for such a pleading.

(sgd) CHARLES R. WILLIAMS,
Attorney for Respondent.

Filed Jun. 13, 1916, in the office of the C erk of the District Court, Canal Zone.

(sgd) E. M. GOOLSBY, Clerk.

DESIGNATION OF JUDGE.

"The White House

Hon. Henry D. Clayton,
United States District Judge,
Montgomery, Alabama.

S i r :

Pursuant to the authority vested in me by the Act of Congress, approved August 24, 1912, known as the Panama Canal Act, I do hereby designate you to perform the duties of the Judge of the District Court of the Canal Zone in the trial of the case of William H. Jackson, Relator vs. H. A. A. Smith, Auditor of the Panama Canal, Respondent, on account of the disqualification of William H. Jackson, Judge of the District Court of the Canal Zone by reason of personal interest, and to perform the duties of said Judge for a period of six weeks thereafter during the absence of said Judge from the Canal Zone on leave of absence.

Dated, Washington, D. C., May 22, 1916.

WOODROW. WILSON,
President of the United States.

Received and filed June 1, 1916.

50 PLACITA.

In the Balboa Division.

United States of America,
Canal Zone,
District Court. ss

Pleas before the Honorable Henry D. Clayton, United States District Judge, Middle and Northern Districts of Alabama, presiding Judge of the District Court of the Canal Zone, by designation of the President under Act of Congress, approved August 24, 1912, at a term thereof begun and holden at Ancon in the Court House of said District, on the 5th day of June, being the first day of the June term in the year of Our Lord one thousand nine hundred and sixteen.

Present: Honorable Henry D. Clayton, Judge,
Hon. Charles R. Williams, District Attorney,
Mr. Wm. H. May, Marshal.
Attest: E. M. Goolsby, Clerk.

And the following proceedings were had

Minutes of June 13th, 1916.

William H. Jackson, Relator
vs. ss No. 107 Civil.
H. A. A. Smith, Respondent.

On this 13th day of June, 1916, this cause coming on for trial and the parties thereto being present in Court in person and by attorneys, now comes the respondent by counsel and presents his argument on the demurrer hitherto filed and the Court having heard the argument and being fully advised in the premises withholds judgment thereon, to which ruling of the Court the respondent duly excepted.

51 And the parties to this cause being ready for trial, N. R. Johnson and J. J. Dudak are duly qualified as reporters for the proceedings herein,

whereupon the relator is sworn and his testimony heard and the Court having heard his testimony orders a continuance until 9.30 o'clock June 14th.

Minutes of June 14th, 1916.

William H. Jackson, Relator.
vs. ss No. 107 Civil.
H. A. A. Smith, Respondent.

On this 14th day of June, 1916, this cause coming on for the further hearing of evidence pursuant to continuance of June 13th, and the parties thereto being present in Court respondent is sworn and his testimony heard and the Court having heard his testimony orders a continuance until 9.15 o'clock June 15th for arguments of counsel.

Minutes of June 15th, 1916.

William H. Jackson, Relator,
vs. ss No. 107 Civil.
H. A. A. Smith, Respondent.

On this 15th day of June, 1916, this cause coming on for argument and the parties thereto being present in Court in person and by attorneys arguments of counsel both for the relator and respondent are heard and the cause continued until June 16th for further argument.

52 Minutes of June 16th, 1916.

William H. Jackson, Relator,
vs. ss No. 107 Civil.
H. A. A. Smith, Respondent.

On this 16th day of June, 1916, this cause coming on for the hearing of further arguments and the parties

thereto being present in Court by counsel further arguments are heard and the Court having heard all the evidence and the arguments of counsel orders that briefs be filed by June 19th and takes the said cause under advisement.

Minutes of July 11th, 1916.

William H. Jackson, Relator,
vs. ss No 107 Civil.
H. A. A. Smith, Respondent.

On this 11th day of July, 1916, this cause coming on for the rendition of judgment and the parties thereto being present in Court the relator in person and by his attorneys and the respondent by his attorney, thereupon the Court reads and files its opinion in this cause which is in the words and figures following:

54 OPINION OF THE COURT.

United States of America.

Panama Canal.

In the District Court of the Canal Zone; Balboa Division.

William H. Jackson, Relator,
vs. Civil No. 107.
H. A. A. Smith, Auditor of the Panama Canal, Respondent.

C. P. Fairman and William C. MacIntyre, of Colon, R. P., Harmodio Arias and Stevens Ganson, of Panama City, R. P., attorneys for the relator.

Charles R. Williams, District Attorney, Ancon, C. Z., attorney for respondent.

Henry D. Clayton, United States District Judge, Middle and Northern Districts of Alabama, presiding by designation of the President under Act of Congress, approved August 24, 1912.

Under the appointment by the President and confirmation by the Senate, William H. Jackson, the relator, duly qualified as district judge of the Canal Zone on May 1, 1914, and has ever since continuously discharged the duties of his office. He became and is entitled to the same salary as that paid a district judge of the United States. (Sec. 8, Act supra.)

The relator avers "that the Congress of the United States has heretofore appropriated funds for the payment of the salary of your petitioner, and has appropriated funds for salaries and expenses necessary for the civil government of the Canal Zone, including the expenses of
55 your petitioner herein while engaged in the performance of his official duties, and that the funds appropriated as aforesaid, are now available for the payment of said salary and expenses." And this allegation is admitted by the respondent in his answer to the petition.

H. A. A. Smith, the respondent, is the auditor of the Accounting Department of the Panama Canal, and is charged with the collection, custody and disbursement of funds for the Panama Canal and the Canal Zone, including the funds appropriated by Congress for the relator's salary. The respondent has paid to the relator his salary monthly and from time to time, but now withholds from him of his salary the sum of $1,131.76 for the payment of the following items of alleged indebtedness to the Panama Canal, namely:

From the salary due the relator for the month of December, 1914, $170.07, for rent of residence, house No. 118, Ancon, C. Z., from May 1st to October 17th, 1914, 5 months and 17 days at the rate of $25.00 per month, and electric current for the same period at the rate of $5.55 per month; from the salary due the relator for the month of January, 1916, $66.66, on account of alleged absence for a period of four days during said month of January beyond the six weeks' leave referred to in the Panama Canal Act; from the salary due the relator for the month of March, 1916, $500.00, to apply on account of rent for use of residence No. 311, Ancon; from the salary due the relator for the month of April, 1916, $341.97, alleged balance due for rent of

house No. 311, Ancon, to April 30, 1916, and account of one days' alleged absence beyond the six weeks' leave referred to in the Panama Canal Act; and from the salary due the relator for the month of May, 1916, $53.06, account of rent for house No. 311, Ancon, and electric current; or a total sum of $1,131.76.

56 The relator avers that he is not indebted to the Panama Canal or the United States in any sum or sums whatsoever, and denies specifically every item of the above mentioned claim of indebtedness, and alleges that the before mentioned sum of $1,131.76 of his salary is being unlawfully withheld from him by the respondent.

The prayer is that the respondent, the Auditor of the Panama Canal, be compelled by peremptory mandamus to audit, approve, issue and deliver to the relator warrants, vouchers or pay checks for his salary as District Judge of the Canal Zone as required by law and the practice, without regard to said claim of indebtedness set up by the respondent, which, as before stated, is denied by the relator.

The respondent admits the appointment and service of the relator as District Judge of the Canal Zone, but he claims that he has the right and that it is his duty to with hold the said sums described on the ground of the relator's alleged indebtedness for house rent and electric lights, and the sums deducted and withheld on account of five days' alleged absence from the Canal Zone in excess of the six weeks' leave of absence specially provided for in Sec. 8, Act of August 24, 1912.

1. This Act is entitled "An act to provide for the opening, maintenance, protection, and operation of the Panama Canal, and the sanitation and government of the Canal Zone." It is sometimes referred to as the Panama Canal Act but is commonly called the Adamson Act after its distinguished author.

It is provided in this Act:

"Sec. 2. That all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by

order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide. The existing Courts established in the Canal Zone by executive order are recognized and confirmed to con-
57 tinue in operation until the Courts provided for in this Act shall be established."

And it is pertinent to quote the following section of the Act:

"Sec. 8. That there shall be in the Canal Zone one district Court with two divisions, one including Balboa and the other including Christobal; and one district judge of the said district, who shall hold his Court in both divisions at such time as he may designate by order, at least once a month in each division. The rules of practice in such district Court shall be prescribed or amended by order of the President. The said district Court shall have original jurisdiction of all felony cases, of offenses arising under section ten of this Act, all causes in equity; admiralty and all cases at law involving principal sums exceeding three hundred dollars and all appeals from judgments rendered in magistrates' Courts. The jurisdiction in admiralty herein conferred upon the district judge and the district Court shall be the same that is exercised by the United States district judges and the United States district Courts, and the procedure and practice shall also be the same. The District Court or the judge thereof shall also have jurisdiction of all other matters and proceedings not herein provided for which are now within the jurisdiction of the Supreme Court of the Canal Zone, of the Circuit Court of the Canal Zone, the District Court of the Canal Zone, or the judges thereof. Said judge shall provide for the selection, summoning, serving, and compensation of jurors from among the citizens of the United States, to be subject to jury duty in either division of such district, and a jury shall be had in any criminal case or civil case at

law originating in said Court on the demand of either party. There shall be a district attorney and a marshal for said district. It shall be the duty of the district attorney to conduct all business, civil and criminal, for the Government, and to advise the governor of the Panama Canal on all legal questions touching the operation of the canal and the administration of civil affairs. It shall be the duty of the marshal to execute all process of the Court, preserve order therein, and do all things incident to the office of marshal. The district judge, the district attorney, and the marshal shall be appointed by the President, by and with the advice and consent of the Senate, for terms of four years each, and until their successors are appointed and qualified, and during their terms of office shall reside within the Canal Zone, and shall hold no other office nor serve on any official board or commission nor receive any emoluments except their salaries. The district judge shall receive the same salary paid the district judges of the United States, and shall appoint the clerk of said Court, and may appoint one assistant when necessary, who shall receive salaries to be fixed by the President. The district judge shall be entitled to six weeks' leave of absence each year with pay. During his absence or during any period of disability or disqualification from sickness or
58 otherwise to discharge his duties the same shall be temporarily performed by any circuit or district judge of the United States who may be designated by the President, and who, during such service, shall receive the additional mileage and per diem allowed by law to district judges of the United States when holding Court away from their homes. The district attorney and the marshal shall be paid each a salary of five thousand dollars per annum."

By the reading of this section it is seen that the District Court of the Canal Zone has original jurisdiction in all cases at law involving principal sums exceeding three hundred dollars, and that jurisdiction of all other matters and proceedings not specially provided for in the Act were

by the terms of the Act itself retained in the District Court or the judge thereof, including jurisdiction of all matters and proceedings of which the Supreme Court, the Circuit Courts and the District Courts of the Canal Zone had jurisdiction at the time the Adamson Act was passed. And it must be remembered that the Code of Civil Procedure of the Canal Zone was by the authorized order of the President, dated May 1, 1907, made a part of the law governing the Canal Zone; and this too, it will be observed, was continued in force by the Adamson Act. This Code provides as follows:

"Sec. 552. Procedure in Mandamus.—The Supreme Court shall have concurrent jurisdiction with the Circuit Courts in all cases where any inferior tribunal, corporation, board, or person unlawfully neglects the performance of an act which the law specially enjoins as a duty resulting from an office of trust or station, or unlawfully excludes the plaintiff from the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully excluded by such inferior tribunal, corporation, board, or person, and also shall have original jurisdiction over Circuit Courts, and judges thereof wherever said Court or judge unlawfully neglects the performance of a duty which the law specifically or specially enjoins as a duty imposed upon such Court or judge. The procedure of the Supreme Court in mandamus proceedings shall be the same as those provided for mandate in this Code."

"Sec. 554. Preliminary injunctions in certiorari, mandate, prohibition proceedings.—In certiorari, mandamus, and prohibition proceedings an injunction may be granted by any judge of the Supreme Court, if in his judgment such injunction is necessary for the preservation of the rights of the parties pending litigation."

"Sec. 555. Expediting such proceedings.—The
59 Court may, in its discretion, make such orders as it deems necessary for expediting proceedings in petitions for certorari, mandamus, or prohibition proceedings."

Thus we find the District Court of the Canal Zone has jurisdiction in all cases where any inferior tribunal, corporation, board or person unlawfully neglects the performance of an act which the law specifically enjoins as a duty resulting from an office or position of trust, or unlawfully denies to or excludes one entitled to the use and enjoyment of a right or office from the use or enjoyment of such right or office or any right which is unlawfully denied by an inferior tribunal, corporation, board or person.

It was never heretofore contended that the former Circuit and Supreme Courts of the Canal Zone did not have authority to issue a writ of mandamus, or that the District Court as now constituted does not have such power. Manifestly Congress legislated, in passing the Adamson Act, with reference to the Code of Civil Procedure, supra, and presumably with knowledge of and reference to proceedings in the Courts, Circuit and Supreme, of the Canal Zone. As now constituted, the jurisdiction and power of the District Court of the Canal Zone was not abridged by the Adamson Act but, on the contrary this Court was invested by the Act with all the powers heretofore exercised by the Circuit and Supreme Courts of the Canal Zone. As before said, it must be presumed that Congress knew the power and jurisdiction of such Courts and the proceedings had in them, and, on admitted elementary principle, the Act of Congress is to be considered in the light of what was done by and in the Courts of the Canal Zone. Let me refer to some of the adjudged cases.

On page 134, vol. 1, of the published Reports of the Supreme Court of the Canal Zone, case No. 45,
60 decided on September 19, 1908, the Supreme Court held that a writ of mandamus would lie, and in fact issued a writ of mandamus to E. M. Goolsby, Clerk of the Circuit Court of the Second Judicial Circuit.

In Canal Zone ex rel. Seixas vs. Gudger, vol. 2, Canal Zone Supreme Court Reports, p. 89, the Supreme Court of the Canal Zone refused to issue a writ of mandamus, not because it did not have jurisdiction so to do but because the relator in that case sought by mandamus to

compel the judge of the Second Circuit Court to grant an appeal when no bill of exceptions had been prepared and presented to him. The closing paragraph of that decision is as follows: (l. c. 71)

"Since, therefore, the petition herein fails to show, that the relator made any proper attempt to perfect his bill of exceptions and since it also fails to show that the respondent unlawfully neglected the performance of any duty specifically or specially enjoined upon him as acting judge of the Circuit Court for the Second Circuit, it is considered by the Court that the alternative writ heretofore issued should be quashed, that the stay granted therein should be vacated and the petition dismissed with costs against the relator.
It is so ordered."

In Canal Zone ex rel. Wm. H. Knox & Co. vs. Goolsby, vol. 2, Canal Zone Supreme Court Reports, 64, a peremptory writ of mandamus did issue to the respondent, commanding him to pay to the relator the sum of $4,434.00. The syllabus in this case is manifestly erroneous as the body of the decision on page 65 shows that a writ of mandamus did issue.

In Canal Zone ex rel. Sucre vs. Owen, vol. 2, Canal Zone Supreme Court Reports, 66, the Supreme Court refused a writ of mandamus directing a judge of the Circuit Court to sign a bill of exceptions when it appeared that the bill of exceptions was tendered solely for the purpose of saving an exception taken to a ruling of the Court on May 23d overruling a motion to vacate a judgment that had been rendered at the March term. The Supreme Court held that the Circuit Court had lost control over the judgment and was powerless to set aside
61 at the May term of Court a judgment rendered at the March term, and that, therefore, even though a bill of exceptions had been signed, it would not have benefitted the party applying for the writ of mandamus. For this reason the writ was refused.

In the case of Kong Ching Chong vs. Wing Chong, vol. 2, Canal Zone S. C. Reports, p. 25, l. c. 29, the Supreme Court in defining the jurisdiction of circuit Courts in the Canal Zone said as follows:

"What is a Circuit Court of the Canal Zone? A Court limited in its jurisdiction by the substantive law of Panama? Not so. They are Courts of equal plenary jurisdiction with the Court of King's Bench in Great Britain and the Circuit Courts of the States of the Union and the United States. Courts of the highest jurisdiction in the world. Nothing jurisdictional is withheld from them. Over the life, the property, and liberty of the litigants before them they possess all juridictional power."

These cases are cited for the purpose of showing that never heretofore was the authority of the Circuit and Supreme Courts of the Canal Zone questioned; and further to show that as a matter of fact writs of mandamus have been issued by these Courts.

As we have said the present District Court of the Canal Zone is vested with all the jurisdiction of the former Circuit and Supreme Courts of the Canal Zone which lawfully exercised the power to issue writs of mandamus.

It is clear that Judge Jackson is entitled to his salary of $6,000.00 per annum in monthly payments of $500.00 just as in case he were a district judge of the United States. And it appears to be equally clear that the District Court of the Canal Zone has authortiy to issue a peremptory mandamus if a proper case is presented.

2. Let us now consider whether mandamus can be rightfully issued against the Auditor of the Panama Canal. The Adamson Act provides as follows:

"Sec. 4. That when in the judgment of the
62 President the construction of the Panama Canal shall be sufficiently advanced toward completion to render the further services of the Isthmian Canal Commission unnecessary the President is authorized by executive order to discontinue the Isthmian Canal

Commission, which, together with the present organization, shall then cease to exist; and the President is authorized thereafter to complete, govern, and operate the Panama Canal and govern the Canal Zone, or cause them to be completed, governed, and operated through a governor of the Panama Canal and such other persons as he may deem competent to discharge the various duties connected with the completion, care, maintenance, sanitation, operation, government, and protection of the canal and Canal Zone. If any of the persons appointed or employed as aforesaid shall be persons in the military or naval service of the United States, the amount of the official salary paid to any such person shall be deducted from the amount of salary or compensation provided by or which shall be fixed under the terms of this Act. The governor of the Panama Canal shall be appointed by the President, by and with the advice and consent of the Senate, commissioned for a term of four years, and until his successor shall be appointed and qualified. He shall receive a salary of ten thousand dollars a year. All other persons necessary for the completion, care, management, maintenance, sanitation, government, operation, and protection of the Panama Canal and Canal Zone shall be appointed by the President, or by his authority, removable at his pleasure, and the compensation of such persons shall be fixed by the President or by his authority, until such time as Congress may by law regulate the same, but salaries or compensation fixed hereunder by the President shall in no instance exceed by more than twenty five per centum the salary or compensation paid for the same or similar services to persons employed by the Government in continental United States. That upon the completion of the Panama Canal the President shall cause the same to be officially and formally opened for use and operation."

Thereafter, in pursuance to the provisions of section 4 above quoted, under date of January 27, 1914, the President promulgated an executive order, sec. 6 of which reads as follows:

"6. There shall be an Accounting Department under the supervision and direction of the auditor, with an assistant in the United States. The duties of the Department shall include all general bookkeeping, auditing and accounting, both for money and property, cost keeping, the examination of payrolls and vouchers, the inspection of time books and of money and property accounts, the preparation of statistical data, and the administrative examination of such accounts as are required to be submitted to the United States Treasury Department; and the collection, custody and disbursement of funds for the Panama Canal, and the Canal Zone."

These same duties shall pe performed for the Panama Railroad Company on the Isthmus when not
63 inconsistent with the charter and by-laws of that Company. The Department shall be charged with the handling of claims for compensation on account of personal injuries and of claims for damages to vessels. Within the limits fixed by law, the duties and financial responsibilities of the officers and employees charged with the receipt, custody, disbursement, auditing and accounting for funds and property shall be prescribed in regulations issued by the Governor, with the approval of the President. The auditor shall maintain such a system of bookkeeping as will enable him to furnish at any time full, complete, and correct information in regard to the status of appropriations made by Congress, the status of all other funds, and the amounts of net profits on all operations, which are to be covered into the Treasury as required by the Panama Canal Act."

The Act conferred a very broad power upon the President. It authorized him to "complete, govern and operate the Panama Canal and govern the Canal Zone, or cause them to be completed, governed and operated through a governor of the Panama Canal and such other persons as he may deem competent to discharge the various duties connected with the completion, care, maintenance, sanitation, operation, government, and protection of the Canal and Canal Zone." Of course, such executive orders as

the President promulgated for the purpose of putting said Act into effect became a part of the Act itself. Moreover, by its very terms the Act did not become operative until the executive order put it into effect. It is plain, therefore, that these executive orders are to be interpreted and treated by this Court as a part of the Congressional enactment.

It will be observed that section 6 of the executive order, Supra, provided that there should be an auditor, with an assistant in the United States. He was authorized to have charge of the collection, custody and disbursement of funds for the Panama Canal and the Canal Zone, including all moneys appropriated by Congress for the Panama Canal and the civil government, etc., of the Canal Zone. He was made at once the custodian, the auditor, and disburser of the funds to be expended on the Isthmus.

This executive order further provided that the auditor shall maintain such a system of bookkeeping as will enable him to furnish at any time full, complete and
64 correct information in regard to the status of appropriations made by Congress, and the status of all other funds and the amounts of net profits on all operations, which are to be covered into the Treasury as required by the Panama Canal Act.

The last sentence of section 6 of the Panama Canal Act, to which this section of the executive order refers, is in this language:

"Monthly reports of such receipts and expenditures shall be made to the President by the persons in charge, and annual reports shall be made to Congress.".

Now, the person in charge of these funds was the auditor, which position or office was created by the President under the executive order above quoted. It is true that the auditor has an assistant in the United States, but he was no more than an assistant there. The auditor in the Canal Zone had charge of the funds and exclusive control over their disbursement. This is manifest from that portion of section 6 of the Panama Canal Act heretofore

quoted; and it was necessary for him to make reports monthly to only one department or official, namely the President, and to make reports annually to only one body, namely Congress. The Act of Congress and the executive orders thereunder placed the auditor of the Panama Canal under the President and the Congress of the United States and under no other official, body or department.

Again, section 5 of the executive order of March 2, 1914, in amplification of section 6 of the executive order above quoted, is in the following language:

"Section V. That the Assistant Auditor provided for in executive order No. 1885, dated January 27, 1914, shall be appointed April 1, 1914. His salary shall be fixed by the Governor. He shall perform such duties of the Accounting Department to be performed in the United States, as may be assigned to him by the Auditor, and also such other duties of a general nature as may be as-
65 signed to him by the Chief of the Washington Office of the Panama Canal.

On and after April 1, 1914, there shall be transferred to the Assistant Auditor, and he shall be charged with the custody, care and preservation of, all records and property of the Disbursing Officer, and of the Assistant Examiner of Accounts of the Isthmian Canal Commission, with which those officers shall be charged on March 31, 1914.

The Chief of the Washington Office may, however, transfer to and place in the custody of the Disbursing Clerk, hereinafter provided for, such of the property and records above described, as he may deem to be essential to enable the Disbursing Clerk to properly perform his duties under this order, but the Disbursing Clerk shall not be permitted, without specific authority from the Chief of Office, to keep a separate set of records and files. He shall be required to rely upon, and consult when necessary, the records and files in the office of the Assistant Auditor, in verifying the legality of claims and accounts submitted to him for payment, or to verify the details of any collection for which he is required to account.

Disbursements will be made by the Disbursing Clerk only after examination of the claim or account in the office of the Assistant Auditor.

Such of the officers and employees employed in the office of the Assistant Examiner of Accounts and the Disbursing Office of the Isthmian Canal Commission on March 31, 1914, as the Governor determines to retain, shall be transferred to and employed in the Accounting Department in the United States, and their salaries fixed at such amounts as the Governor deems just and reasonable.

There shall be a Disbursing Clerk for that part of the Accounting Department in the United States, who shall perform similar duties to those that are required to be performed by the Collector and Paymaster on the Isthmus, insofar as there are such duties to be performed in the United States, and shall be subject to the same supervision by the Assistant Auditor, as the Collector and Paymaster on the Isthmus are by the Auditor. He shall give bond in such amount as may be fixed by the Governor, or by his authority.

Such of the officers and employees as are transferred to and employed in the Accounting Department in the United States, shall be distributed between the office of the Assistant Auditor and that of the Disbursing Clerk, respectively, as the needs of the service require. They shall perform such duties as may be assigned to them by proper authority. They shall be subject to similar financial responsibilities, and to the same general rules and regulations that have been prescribed for like officers and employees in the Accounting Department on the Isthmus.

It is the purpose of this order, and it shall be construed, as to require the Assistant Auditor of the Panama Canal to examine all claims and accounts before their payment by the Disbursing Clerk; to carry on all general correspondence in relation to claims and accounts required to be conducted by the Accounting Department in the United States; to prepare all vouchers and certify to the validity of all claims and accounts

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before they are submitted to the Disbursing Clerk for payment; to furnish to the Disbursing Clerk all necessary data to enable that officer to make reply to any exceptions that may be taken to his account by the Auditor for the War Department; to keep all general records to be kept in the Accounting Department in the United States; to make all reports as to statistical data required to be sent to the Auditor on the Isthmus; to give an administrative examination to all accounts of the Disbursing Clerk before they are transmitted to the Auditor; to make an administrative examination of all claims which are to be submitted to the Auditor for direct settlement; to keep a complete record of all collections to be made and all moneys received by the Disbursing Clerk; to certify to the correctness of the Disbursing Clerk's accounts for collections; to see that bills collectible are issued and collections made in all proper cases; to have charge of all general files which are required to be kept by the Accounting Department in the United States; and to perform such other duties as may be assigned to him by the Auditor, or the Chief of the Washington office."

The executive order of March 2d above quoted is as much the law as the Act of Congress or the executive order of January 27th hereinbefore referred to. It is an enlargement or explanation of section 6 of the order of January 27th. It clearly defines the duties and functions of the assistant auditor and conclusively shows that such assistant in the United States is under the direction of the auditor on the Isthmus, who is the final auditor. And it will be observed this section last quoted states that the disbursing clerk under the assistant auditor in Washington shall be subject to the same supervision by the assistant auditor as the collector and paymaster on the Isthmus are by the auditor. It is plain that this section accentuates the fact that the assistant auditor at Washington is under the supervision of the auditor on the Isthmus, and this assistant is specifically directed to report to such auditor.

It seems that nothing further need be said to demonstrate that this auditor, the respondent in this case, is the final auditor. But he is more than an auditor because by the very provisions of the executive order creating his office he not only audits but he orders the disbursement of all funds for the language of the Act charges him
67 with the disbursement of the funds. It is a reasonable and consistent interpretation to say that the executive order shows that the disbursing clerks and paymasters under the assistant auditor in Washington and under the auditor on the Isthmus, the final auditor, are no more than pay clerks who are required to pay the vouchers as they have been audited by the assistant auditor in Washington, and by the auditor on the Isthmus who is vested with the power of disbursement.

It seems to be incontrovertible that the two provisions of the two executive orders above quoted, one putting the Canal Act into operation, and the other amplifying and explaining the terms of the first order, are as much a part of the Panama Canal Act itself as if these two sections had been embraced in the Act. I think the conclusion necessarily follows that the respondent is the final auditor so far as Judge Jackson's salary is concerned.

And I think also that it is not to be doubted that the auditor, under the provisions of the Canal Act, needs only to report to the President and to Congress. It is not believed if it had been the intention of Congress that the final auditor should be in Washington, and that the auditor on the Isthmus should be under some other official, that the office of assistant auditor would have been created whereby the assistant at Washington is to act under the auditor on the Isthmus. It is entirely consistent to say that the Panama Canal maintains what may be termed a branch office at Washington with the assistant auditor there to audit the accounts of that branch office; and as a part of his duty under section 5 of the executive order of March 2, 1914, he is required to send data to the auditor on the Isthmus and to transmit the examination of accounts to the auditor on the Isthmus.

Recurring to the duties of the auditor of the Panama Canal, it is to be borne in mind that under the Adamson Act and executive orders in pursuance thereof
68 he is charged with "the collection, custody and disbursement of funds for the Panama Canal and the Canal Zone" as I have attempted to show. (Sec. 4 of the Adamson Act, and sec. 6, executive order, January 27, 1914, supra). And in the so-called Sundry Civil Act of March 3, 1915, (Stat. at L., 63rd Cong. 3d S., 883 84), the appropriation is made "for expenditures requisite for and incident to the construction, maintenance and operation, sanitation, and civil government of the Panama Canal, and Canal Zone, including the following: Compensation of all officials and employees * * and for such other expenses not in the United States, as, * * necessary to best promote the construction, maintenance, operation, sanitation, and civil government of the Panama Canal, * * as follows: * * For civil government of the Panama Canal and Canal Zone, salaries of the district judge $6,000, district attorney $5,000 and marshal $5,000. etc.

It is seen that expenses not in the United States, including the civil government of the Panama Canal, embrace the specific sum of $6,000 appropriated by the Act of Congress for the payment of the salary of the district judge, up to June 30, 1916. It is my opinion that in legal contemplation this fund is on the Isthmus and is subject to disbursement there under the direct authority of the auditor of the Panama Canal, who must report with reference thereto to the President and to the Congress, and who is not otherwise required to report.

Under the law and the practice obtaining in the Canal Zone in such case it is the duty of the auditor to make and deliver the pay voucher to relator for his salary at the end of each month, and under the same law and practice it is the duty of the paymaster, who is no more than a paying teller of the respondent, to pay the salary upon the certificate or voucher of the auditor there.
69 Nothing is left to the judgment or discretion of the auditor in the matter of such disbursement. He is required to perform a ministerial duty and no more.

3. In his answer the respondent says that he has sought the advice of the Comptroller of the Treasury under the following provision of the Dockery Act, (R. S., Vol. 2, 1892-1901, P. 216, Act of July 31, 1894):

"Disbursing officers, or the head of any executive department or other establishment not under any of the executive departments may apply for and the Comptroller of the Treasury shall render his decision upon any question involving a payment to be made by them or under them."

And he insists that the Comptroller has rendered a decision against Judge Jackson that precludes any action by this Court.

Now the only question involved in the payment of the Judge's salary is the one raised by the respondent who withholds $1,131.76 of the salary where the services and identity of Judge Jackson are admitted. The pleadings in the case and the briefs submitted by counsel in behalf of the respondent, as well as the testimony and oral argument show that the respondent did not submit to the Comptroller a question of payment to be made by him as auditor. But, rather, that he did submit to the Comptroller the question as to whether or not he as auditor had the right to retain portions of the relator's salary for the satisfaction of alleged indebtedness of relator to the United States or the Panama Canal.

The relator's salary does not fall under the category of a claim against the United States. It is fixed compensation earned by him and for which a specific appropriation has been made and the manner of disbursement provided for. It requires no argument to show that the case at bar is different from one where a claim is made against the United States and judgment and discretion is vested in an accounting officer authorized by law to adjust and settle the claim. In such case as that the Comptroller of the Treasury shall upon application render his decision upon any question involving a payment to be made.

70

Here the salary was ascertained or fixed by law and the money for its payment appropriated by Congress as before stated. In legal effect it was on the Canal Zone, or in the hands or under the control of the disbursing officer, who is the respondent here. There was nothing left to the judgment or discretion of the respondent whose duty it was to disburse the money appropriated for the salary. Being satisfied of the identity of Judge Jackson it was the plain duty of the respondent to issue his warrant for the salary.

The salary of a judge who has served and for whose compensation specific appropriation has been made is not such a claim that affords any field for the operation of the Dockery Act. We are not without a guiding precedent. In the case of Benedict vs. U. S., 176 U. S., 357-361, it was said:

"The case in reality turns upon the meaning of the word "salary", as used in section 714. The word "salary" may be defined generally as a fixed annual or periodical payment for services, depending upon the time, and not upon the amount, of services rendered * * * as applied to district judges in general, and, indeed, to every district judge except the judge of the Eastern District of New York, it doubtless refers to the salary of five thousand dollars fixed by the Act of February 24th, 1891.

Such salary is an annual stipend payable in sickness as well as in health, for duties much more onerous in some districts than in others, and regardless of the fact whether such duties are performed by the judge in person, or by the judge of another district called in to take his place. It is a compensation which cannot be diminished during the continuance of the incumbent in office, and of which he cannot be deprived except by death, resignation, or impeachment."

There the Supreme Court of the United States distinctly declared that a Federal Judge cannot be deprived of his salary in whole or in part expect by death, resignation or impeachment. Of course, the appointment and quali-

fication of a territorial judge who did not act as such but was removed from office by executive order would not entitle him to a salary. That was the case in U. S. vs. Guthrie, 17 How. 284, 302-34, which is here-
71 inafter considered and differentiated from the present case.

If the judge can be deprived of a part of his salary for alleged indebtedness for house rent when such rental charge was fixed arbitrarily, that is to say, without his consent and without any authority of law, such charge could by the same token or assumed authority have been made $500.00 per month, and thus so adjusted as to absorb the entire salary of the Judge. I do not think that such a conclusion would be more absurd than the contention of the respondent that how much of and for what purpose he can withhold the salary of the Judge, is a matter entirely in the judgment and discretion of the respondent; and that his action in such matter cannot be reviewed by a Court. There cannot be such an autocrat.

Our Government cannot be reduced to a bureaucracy. Chief Justice Marshall said that the government of the United States has been emphatically termed a government of laws and not of men; and it is emphatically the province and duty of the judicial department to say what the law is. Marbury vs. Madison, 1 Cranch, l. c. 165 & 177. And as pertinent here it may be added that the judicial department must be allowed to continue to adjudge in cases involving personal and property rights.

It was asserted by counsel for respondent that the salary of the Judge was a claim or demand against the United States and that the amount alleged to be due by relator to the Panama Canal by way of house rent was a claim or demand against the relator and that, therefore, the Auditor acted within the provisions of that section of the Dockery Act above quoted in submitting this matter to the Comptroller. But as I have said, it was a disputed claim merely because of the fact that the Auditor, the respondent in this case, had made it so. It cannot be said that the salary of the judge constituted a claim disputed or other-

wise prior to the time that the respondent in this case saw fit to so assume. Furthermore, the Dockery Act provides that the auditor may submit to the
72 Comptroller of the Treasury a question involving a payment to be made by the auditor. This was no question of a payment to be made from government funds by the auditor to a party asserting a right to such funds. It is a question of the auditor retaining from a Federal judge, whose salary had been provided for and appropriated by Congress, such amounts as he saw fit to withhold. The claim in dispute was not against the Government; it was against the relator. The Act does not provide, and clearly never contemplated that the auditor should arrogate to himself the right to even consider that any amount by way of claim or otherwise could be deducted from the salary of a Federal judge based upon an alleged claim asserted by officials of the Government.

Under this Dockery Act, therefore, this alleged claim was improperty submitted to the Comptroller of the Treasury by the respondent. It seems to me that the Comptroller of the Treasury should have advised the Auditor when he submitted the alleged claim that he, the Comptroller, had no authority to pass upon it. The law confers no such function upon the Comptroller nor upon the Auditor. Consequently, the opinion of the Comptroller of the Treasury was extra-official, was not required by law, and constituted purely a gratuitous act of the respondent in this case in furtherance of his endeavor to unlawfully withhold relator's salary from him. The contention of the counsel for respondent that this Court is without jurisdiction to issue the writ of mandamus because the Comptroller of the Treasury had "judicially decided the question" is, I think, untenable.

4. I do not think that there is any merit in the respondent's contention that he performs his duty under administrative organization and not under statutory organization. When the Congress passed the Panama Canal Act of August 24, 1912, and authorized the President

73 to put it into operation when he deemed it expedient, and further authorized him to create such offices as he deemed necessary to provide for the sanitation and civil government of the Canal Zone, when the President, acting under the express authority of Congress, by executive order of January 27, 1914, created an accounting Department under the supervision and direction of the auditor, who is the respondent; and when Congress later, in March 1915, appropriated money to pay this relator's salary of $6,000 per annum to June 30, 1916, and provided that it be paid on the Isthmus, it thereby became the duty of this auditor, created in pursuance of the statute, to audit and pay the salary as Congress had directed in the Adamson Act and the Sundry Civil Appropriation Act of March 3, 1915.

It is not to be doubted that the executive orders of January 27th and March 2nd, 1914, are in legal contemplation integral parts of the Panama Canal Act itself and these and the Appropriation Act of March 1915, appropriating the funds to pay the relator's salary on the Isthmus, are binding law compelling upon the respondent. In legal appreciation the respondent's office was created by statute; that is, by order in pursuance of a statute, which has all the effect of a statute, and that thereby his duties are clearly defined.

5. The respondent contends that the Auditor of the War Department is the proper party against whom this relator should proceed, and predicates his contention upon this provision of the Act of Congress approved October 22, 1913:

"The money accounts of the Panama Canal, under the Panama Canal Act of August 24, 1912, (Stat. at L., vol. 37, p. 560), shall continue to be audited by the Auditor for the War Department."

It must be conceded that this statement is general and that, on the other hand, specific authority is given by the executive order of the President of the United States

to the auditor on the Isthmus both to audit and disburse all funds appropriated by Congress in connection with the Panama Canal.

74 I do not think that there is necessarily any conflict between the provision last above quoted and the executive orders promulgated under the Adamson Act. It is clear that prior to October 22, 1913, the Auditor of the War Department had never audited the salary of the district judge for the simple reason that the office of district judge was not created until the Panama Canal Act was put in force and effect by the executive order of the President in 1914. The office was created on April 1, 1914, and the present incumbent was confirmed by the Senate and received his commission as district judge on May 1, 1914. Consequently, whatever other accounts the Auditor for the War Department may have audited prior to October 22, 1913, he could not have audited the salary of the district judge of the Canal Zone, there then being no district judge, and, therefore, no salary of such officer to audit. The quotation from the Act of October 22, 1913, states that the money accounts of the Panama Canal shall continue to be audited by the Auditor for the War Department. The salary of this relator is a new account which never existed and, consequently, did not need to be audited until after the promulgation of the executive orders of January 27, and March 2, 1914, creating the Accounting Department on the Isthmus, making the respondent in this case the final auditor, and defining the duties of certain of his subordinates both on the Canal Zone and at Washington. I find no law making it imcumbent upon the Auditor of the War Department to audit the salary of this relator, and there is nothing to show that, in the absence of statutory authority, this official had any authority to pass upon or to audit such salary.

And, again, when the Sundry Civil Appropriation Bill of March 3, 1913, providing for the payment of the salary of the relator, and appropriating the amount thereof, and directing its payment, was passed, the fund for the pay-

ment of the judge's salary was placed under the
75 control of the auditor on the Isthmus. Congress knew when this Act making the appropriation for the judge's salary was passed, that in January and in March, 1914, the President had created the office of auditor on the Isthmian Canal, with an assistant at Washington, and that this law and the executive orders in pursuance thereof specifically defined the power and authority that was vested in the auditor on the Isthmus and in his assistant at Washington. Furthermore, when Congress made this appropriation for the payment of the salary of the district judge it was done almost two years after the Act of October 22, 1913. If the latter Act could ever have had the meaning attributed to it by the respondent the subsequent act of Congress, enacted presumably with the knowledge and approval of the two executive orders referred to, destroys the force of the provisions of the Act of October 22, 1913, as insisted upon by the respondent. It follows that when Congress in March, 1915, appropriated the amount of relator's salary that had been previously fixed by the Adamson Act of August 24, 1912, Congress knew the provisions of the Act of October 22, 1913, and also knew in making the appropriation for relator's salary, it would be paid pursuant to the executive orders hereinbefore set forth.

It is familiar law that repeal by implication is not favored and it is a recognized canon that where two acts are in apparent conflict they must be so construed, if possible, as that they shall consist or harmonize with each other. And as a corollary the rule is that when two legislative provisions are in seeming conflict, the one being vague and general, and the other clear and specific, the latter will control; and, further, that if separate fields can be found for the operation of the two seemingly conflicting provisions, then, in such way, must the apparent hostility between the two provisions be reconciled and each allowed to operate in its own particular field.

76 6. The respondent contends that this relator should seek a mandamus against the Auditor

for the War Department at Washington. Were he to do so it seems to me such Auditor would answer that the Adamson Act and the executive orders of January and March, 1914, and the Appropriation Act of March, 1915, placing the funds for the payment of the relator's salary under the control of this respondent, would preclude this relator from having any remedy against him. I believe that such contention would be fatal to relator's case there.

The respondent further suggests that Judge Jackson can resort to the Court of Claims for the vindication of his rights. That Court passes upon disputed claims, and whenever a judgment is rendered there it is the duty of Congress to appropriate money for its payment. Probably that tribunal would hold that demand for the payment of Judge Jackson's salary could not be a claim triable there; that it is not a claim but is compensation fixed by law, for which payment is provided for by an existing appropriation. Benedict v. U. S. infra.

7. The rules of law governing mandamus against a public officer are well settled. The difficulty is making the proper application of the law in a particular case. Where a plain ministerial duty is imposed upon an executive officer—such a duty as leaves nothing to be determined according to his judgment and discretion—and he refuses to act under such circumstances, mandamus is appropriate to compel him to perform his duty. This is, of course, a principle universally recognized.

I think the misunderstanding in this case is attributable to a misconception of the law. Some time a too free use of cyclopaedias and digests is resorted to, and too little real study is devoted to adjudged cases cited. It must be understood that no stricture is intended upon the counsel who made the oral argument for the respondent,
77 for he, the District Attorney, presented his own well prepared brief and has demeaned himself altogether as a thoughtful and competent lawyer.

The numerous cases cited in the briefs for the respondent may be divided into two classes: 1—Cases where the Supreme Court held that executive officers could not be

compelled by mandamus to act in matters which had been left to their judgment or discretion. Illustrative of this principle is U. S. v. Lamont, 155, U. S., 303-310, where Mr. Justice White, (now the Chief Justice), in the opinion of the Court, said:

"Much was said in argument at bar upon the question of when a contract is to be regarded as completed, under the circumstances here presented, and the discussion concerning the authority of the Secretary of War to review the action of an officer of engineers in such a case and to direct a new adjudication, has taken a wide range. We deem the consideration of both these points unnecessary in view of the relator's bids under the "second advertisement and specifications, and his contract to do the work at a less price and under new conditions. It is elementary law that mandamus will only lie to enforce a ministerial duty as contradistinguished from a duty which is merely discretionary. This doctrine was clearly and fully set forth by Chief Justice Marshall in Marbury v. Madison, 5 U. S. 1 Cranch, 137 (2;60), and has since been many times reasserted by this Court. See Kendall v. Stokes, 44 U. S. 3 How, 87 (11:506); Brashear v. Mason, 47 U. S. 6 How. 92 (12:357); Reeside v. Walker, 52 U. S. 11 How, 272 (13:693); Holloway v. Whitelay, 71 U. S. 4 Wall. 522 (18:335); United States v. Seamen, 58 U. S. 17 How. 225, 231 (15:226, 228); United States v. Guthrie, 58 U. S. 17 How. 284 (15:102); United States v. Edmunds, 72 U. S. 5 Wall. 563 (18:692); Gaines v. Thompson, 74 U. S. 7 Wall. 347 (19:62); Cox v. United States, 76 U. S. 9 Wall. 298 (19:579); United States v. Schurz, 102 U. S. 378 (26:167); Butterworth v. United States, 112 U. S. 30 (28:656); United States v. Black, 126 U. S. 40 (32:354); Brownsville Taxing Dist. v. League, 129 U. S. 493 (32:760); Noble v. Union River Logging R. Co. 147 U. S. 165 (37:123).

"The duty to be enforced by mandamus must not only be merely ministerial, but it must be a duty which exists at the time when the application for the mandamus is made. Thus in the case of ex parte Rowland, 104 U. S. 604

(26:861) this Court, speaking through Mr. Chief Justice White, said: "It is settled that more cannot be required of a public officer by mandamus than the law has made it his duty to do. The object of the writ is to enforce the performance of an existing duty, not to create a new one."

"Moreover, the obligation must be both per-
78 emptory, and plainly defined. The law must not only authorize the act (Kentucky v. Boutwell, 80 U. S. 13 Wall. 526 (20:631), but it must require the act to be done. "A mandamus will not lie against the Secretary of the Treasury unless the laws require him to do what he is asked in the petition to be made to do" (Reeside v. Walker, 52 U. S. 11 How. 272 (13:693), see also Cox v. United States, 76 U. S. 9 Wall. 298 (19:579), and the duty must be 'clear and indisputable', Knox County Comrs. v. Aspinwall, 65 U. S. 24 How. 376."

And 2, cases where plain ministerial duty was enjoined upon executive officers and mandamus was used to compel its performance. Illustrative of this principle is Roberts vs. U. S. ex rel. Valentine (176 U. S. 221) where Mr. Justice Peckham, for the Court, said:

"The writ was refused in the Black case, because, as the Court held, the decision which was demanded from the Commissioner of Pensions required of him, in the performance of his regular duties as Commissioner, the examination of several acts of Congress, their construction, and the effect which the later acts had upon the former, all of which required the exercise of judgment to such an extent as to take his decision out of the category of a mere ministerial act. A decision upon such facts, the Court said, would not be controlled by mandamus. The circumstances under which a party has the right to the writ are examined in the course of the opinion, which was delivered by Mr. Justice Bradley, and many cases upon the subject are therein cited, and the result of the examination was as just stated.

"In this case the facts are quite different. There is but one act of Congress to be examined, and it is specially

directed to the Treasurer. We think its construction is quite plain and unmistakable. It directs the Treasurer to pay the interest on the certificates which has been redeemed by him, and the only question for him to determine was whether these certificates had been redeemed within the meaning of that act. That they were, we have already attempted to show, and the duty of the Treasurer seems to us to be at once plain, imperative, and entirely ministerial, and he should have paid the interest as directed in the statute.

"This case comes within the exception stated in the Black case, that where a special statute imposes a mere ministerial duty upon an executive officer, which he neglects or refuses to perform, then mandamus lies to compel its performance; but the Court will not interfere with executive officers of the government in the exercise of their ordinary official duties, even those whose duties require an interpretation of the law, the Court having no appellate power for that purpose. On this last ground the Court denied the writ.

"Unless the writ of mandamus is to become practically valueless, and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. Every
79 statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when

his refusal is brought before the Court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the Court would on that account be powerless to give relief. Such a limitation of the powers of the Court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required.

"In this case we think the proper construction of the statute was clear, and the duty of the Treasurer to pay the money to the relator was ministerial in its nature, and should have been performed by him upon demand.

"The judgment of the Court of Appeals must be affirmed."

The respondent cites a number of cases to sustain his assertion that mandamus will not lie in this case. He contends that this is an action against the auditor in such official capacity as he may have, and is in effect an action against the United States, and cites United States vs. Guthrie, Secretary of the Treasury, 17 How., 284, 302-34. Of course that case has been many times cited with approval by the Supreme Court of the United States. The principle was correctly applied there to the facts, but the case cannot be a precedent here to support the respondent's contention.

There the relator Goodrich, on March 19, 1849, was duly commissioned Chief Justice of the Supreme Court of the territory of Minnesota at a compensation of $1,800.00 a year, payable quarterly. The tenure of his office was four years. After having received his lawful compensation for the time he had served the
80 relator was informed on October 22, 1851, by the Acting Secretary of State that the President had removed him from office and had appointed in his place Jerome Fuller. After the four years from the

date of his commission had expired the relator preferred a claim before the First Auditor of the Treasury for the sum of $2,343.00 as compensation for the period that had elapsed from the date that he was removed from office to the termination of the four year period. The claim was rejected for the reason that there was no appropriation to pay his salary, and that the amount of the salary had been paid to Fuller who had fulfilled the duties of the office, and that the auditor and comptroller were bound to consider the removal of the relator and appointment of Fuller as legal and continuing. The Supreme Court affirmed the ruling of the Circuit Court in dismissing the application for the writ of mandamus upon the grounds that there is no power in the Circuit Court or in the Supreme Court to command the withdrawal of moneys from the United States Treasury to be applied in satisfaction of disputed claims against the United States; that no appropriation had ever been made to pay the salary of the relator, but that the appropriation had been made to pay the salary of the subsequent appointee of the President, who filled the office from which the relator had been removed; and that the acts of the auditor, the Comptroller and the Secretary of the Treasury in passing upon the claim were discretionary and quasi judicial and that they were not merely ministerial, and that, therefore the Court had no power to mandamus these officials.

The principle announced as governing that decision has no application to the case at bar for the two cases are so different in essential particulars. A statement of these differences and further comment seem to be unnecessary. It is hardly necessary to add that the proceeding here is not an action against the United States but
81 is an action to compel an official of the United States to do his plain ministerial duty under the laws of the United States.

The respondent cites U. S. vs. Lynch, 137 U. S. 280. In that case the relator was ordered in March 1872 by his superior officer to proceed from Philadelphia to New York and thence by Pacific Mail to Colon, cross the Isthmus of Panama, and thence to Mare Island, California,

and report for duty on board of the U. S. S. Lackawanna. Relator was a naval officer. He traveled 88 miles overland from Philadelphia to New York and some thousands of miles outside of the United States. He claimed that he was entitled to be paid 10 cents a mile for the full number of miles travelled. The respondent, the Fourth Auditor and the Second Comptroller of the Treasury, answered that the relator had been paid 10 cents a mile for the total number of miles travelled in the United States, and his traveling expenses while traveling outside of the United States. It was found that for a number of years the Navy and Treasury Departments had, with but a single exception, held that the 10 cents a mile did not apply to travel to, from or in foreign countries but only to travel in the United States. This had long been the interpretation of the statute by the auditor and the comptroller. The relator sought to compel these officials by mandamus to interpret the statute differently from the way they had theretofore construed it—to compel them not only to exercise a discretionary or quasi judicial act but to exercise it in his favor. There the relator had at most a claim against the United States for money expended by him. No act had appropriated any money for him that was available and withheld by the respondents. The Court of Claims was the proper forum in which the relator in that case should have sought vindication for his claim if he had any proper claim.

82 The case of Reeside vs. Walker, 11 Howard 290, is relied on by the respondent. There Reeside had certain postoffice contracts with the Government of the United States. Alleging that he had been overpaid thereon suit against him was brought in the Circuit Court of the United States for the Southern District of Pennsylvania for the recovery of the sum of $32,709.62, the amount alleged to have been overpaid. Defendant filed a general demurrer and a counterclaim, and on trial being had a verdict was returned finding that the plaintiff was indebted to the defendant for $188,496.06. On May 12, 1842, the transcript of the record bore the following entry: "Motion for new trial overruled: new

trial refused and judgment on the verdict, copy of assignment, etc., filed."

Later the executrix of defendant sought to compel the Secretary of the Treasury, by mandamus, to enter on the books of the Treasury Department to the credit of the deceased the sum of $188,496.06, and to pay the same to the relator as executrix of the deceased. The Supreme Court refused to grant the writ for the reasons; that from the record no judgment appeared to have been given for the amount of the verdict; that relator failed to show the entry of a judgment; and that the verdict of the jury merely laid the foundation for a scire facias to issue and a hearing to be had on that if desired.

The Court said that "The petitioner and her husband have neglected to pursue the case in that way to the final judgment, and, hence, have offered no evidence of one, of the verdict of indebtedness to Reeside by the United States." On these two points the Court acted, and the rest of the case is merely obiter dicta. It was further stated, however, that there was no appropriation of Congress to pay the claim and that it was "a well known Constitutional provision that no money can be taken or drawn from the public treasury except upon an appropriation by Congress.

The respondent refers to the United States vs. Bank, 104 U. S. 733, as a supporting authority. That case was an appeal from the Court of Claims. The bank had paid certain taxes and afterwards discovered
83 that $972.69 was wrongfully exacted and paid. It then sought the refund of that amount. The Commissioner of Internal Revenue and the Secretary of the Treasury approved the payment of the claim and the Commissioner certified its allowance. Payment was refused by the officers of the Treasury. The Court of Claims decided in favor of claimant and against the United States, and the Supreme Court sustained this ruling. There is nothing more to that case.

United States vs. Kaufman, 96 U. S., 369, is cited by the respondent as an authority. That was an appeal from the Court of Claims, which had held that it had

jurisdiction of a suit to recover an excess amount paid by way of special tax, and that an allowance of the claim by the Commissioner of Internal Revenue was sufficient, and that the Court did not need to go behind the allowance and find the facts in respect to the original claim. The Supreme Court of the United States sustained that decision.

It will be noted that although the four cases above cited laid down general principles of law which are well recognized they have absolutely no analogy to the case now under consideration.

Buchanan vs. Alexander, 4th How., 20, is cited by the respondent to sustain the proposition that money in the hands of a disbursing officer is money in the Treasury of the United States and cannot be reached by attachment or other process. In that case seamen of the frigate Constitution were indebted to boarding house keepers in Norfolk, Virginia. They sought to attach the wages of these seamen in the hands of the purser of the vessel. The Supreme Court held that the money was not subject to attachment. In the case at bar no one corresponds to the boarding house keeper, no one to the seamen, and no one to the purser, and no writ of attachment is sought.

The respondent contends that the principle
84 recognized in Mississippi vs. First Comptroller of the Treasury, Durham (4th Mackay, 235), is applicable here. I am unable to examine this case as the report in which it is published is not to be had on the Zone. The respondent gives in his brief the following purported excerpt from the opinion:

"That a Court must not permit the United States to be sued by a mandamus directed to one of its officers where it could not be sued directly unless by its own consent under some special statute allowing it. Now it does not require argument to manifest that a refusal by an officer of the Treasury Department whose general duty under the law is to allow and take steps to issue a warrant for the payment of any claim, is a refusal of the claim by the United States for the time being; that a mandamus against him to compel the allowance and pay-

ment thereof, is a suit against the United States, and that it is none the less a suit against the United States because the ground or notices of refusal to allow may be obviously and notoriously without legal justification. In other words, that no error of judgment or capriciousness of conduct can destroy, for the time being, the quality of agent and actor in the name and on behalf of the Goverment of the proper Treasury official in disallowing the claim of any State or individual for money due or alleged to be owing by the United States."

I fail to see what bearing that decision has upon the instant case, for Judge Jackson's salary is not a claim and there is no dispute in respect to the payment of the same except that which arises from the denial of the authority of the Auditor to withhold a part of the ascertained and fixed salary. I have dealt with this phase of the case in another part of this opinion.

Louisiana vs. McAdoo, 234 U. S., 627, is cited by the respondent. In that case the State of Louisiana, through its Attorney General, sought to obtain permission to file a petition against the Secretary of the Treasury and the Assistant Secretary of the Treasury in order to review their official judgment as to the rate of duty to be exacted under various tariff acts. In that case the Court said that if the State of Louisiana, as a producer of sugar, could review the action of the Secretary of the Treasury in determining the rate to be collected on Cuban sugar,

any consumer, though not an importer, might
85 make a similar complaint if in his judgment the Secretary of the Treasury exacted a higher rate

than justified by the law, thereby enhancing the price he must pay in the market upon the imported articles which he used. The Court held that it was an attempt to review the official action of the Secretary of the Treasury in the exercise of his judgment as to the rate which should be demanded under his construction of the tariff act, and that such suits would operate to disturb the whole revenue system of the Government, and effect the revenues which arise therefrom. Furthermore, it was stated that

such a suit would obviously be one against the United States as such.

The respondent cites United States ex rel. Goldberg vs. Daniels, 231 U. S., 218. That was a petition for mandamus, praying that the Secretary of the Navy be directed to deliver the U. S. cruiser Boston to the petitioner. It was asserted that the petitioner had bid more than the appraised value of the ship which, after survey, condemnation and appraisal, had been stricken from the naval registry under the act of August 5, 1902, and proposals for the purchase of which the Secretary of the Navy had advertised. After the petitioner sent his certified check to the Secretary of the Navy, the Secretary refused to deliver the vessel and returned the check. The answer admitted the fact, and set up that the bid was not the acceptance of an offer but was only an offer in itself subject to be accepted or not, at the discretion of the Secretary, and that the Secretary never accepted the petitioner's bid, the Government having decided to lend a cruiser to the Governor of Oregon for use by the naval militia of that State. The petition was refused by the Court below on the ground that the discretion of the Secretary was not ended by the receipt and opening of the bids even though they satisfied all the conditions prescribed. This judgment was affirmed.

In Ness vs. Fisher, 223 U. S., 683, referred to by
86 respondent the Secretary of the Interior refused to accept, as conforming to the Timber and Stone Act of June 3, 1878, an application to purchase under that Act 160 acres of public land in the Roseberg Oregon Land District. The relator sought to compel the Secretary of the Interior to accept his application. It had been refused by the Secretary of the Interior who ruled that the application was objectionable in that it was made upon information and belief and not upon personal knowledge; that it was in fact for cultivation and valuable chiefly for its timber, and that it was uninhabited and contained no mining or other improvements. The Court said that it was confronted with the question, not whether the decision of the Secretary was right or wrong, but whether a decision of that officer, made in the discharge of a duty

imposed by law and involving the exercise of judgment and discretion, could be reviewed by mandamus and he be compelled to retract it and to give effect to another finding, not his own and not having his approval. Manifestly the Court of appeals was right in its refusal to issue the writ of mandamus, and the Supreme Court sustained the ruling.

In Champion Lumber Co. vs. Fisher, 227 U. S., 445, on the respondent's brief, the petitioner sought to compel the Secretary of the Interior and the Commissioner of the General Land Office, by writ of mandamus, to issue a patent for lands. It seems that the Commissioner and the Secretary of the Interior were advised by an agent, whom they had appointed to investigate, that flagrant fraud had been committed, and they were requested to withhold patents to the lands. Thereupon the Commissioner directed the Registrar and Receiver, Jackson, to suspend action on commutations and proofs until further investigation. It was further shown by the report of another special agent that the entry had been made for speculative purposes with no attempt to comply with the requirements of the law, and the receommendation was made that the entry be cancelled on the ground of non remedy, non cultivation, non improvement, and
87 abandonment. The Commissioner directed that a hearing be had. Petitioner moved for a stay of proceedings, and claimed that his entry should be patented without further proceedings. The motion was denied by the Commissioner, and this denial overruled by the Secretary of the Interior who later denied a motion to review his decision, finding that a protest had been filed against the patent within two years from the issuance of the receiver's receipt, and holding that the case should proceed to hearing on the special agent's charge. The petitioner then sought relief in the Court, praying that the Commissioner and the Secretary of the Interior be directed by mandamus to issue the patent as heretofore stated.

The Court held that this was an attempt to coerce the Secretary of the Interior in the exercise of his lawful discretion and judgment. It was said: "The case was,

therefore, submitted and decided upon the issue whether the action of the Secretary was justified in the exercise of his lawful discretion because of the facts disclosed in the record." The petitioner did not challenge nor did the Court pass upon the validity of an authority exercised, nor was the existence or extent of the authority or duty of an officer of the United States drawn in question in the sense in which it is used in the statute, the Dockery Act. This case was ultimately decided on the ground of jurisdiction; that the petition for the writ of error should be denied. The Supreme Court held that the case was not one that was appealable to that Court under the fifth clause, section 250, of the Judicial Code, and, by way of obiter, that the action of the Secretary of the Interior was wholly discretionary and, therefore, not subject to review by mandamus.

In Orgeon vs. Hitchcock, 202 U. S., cited by respondent, the Supreme Court held that the immunity of the United States from suit prevented a State from maintaining in the Supreme Court of the United States a suit
88 against the Secretary of the Interior and the Commissioner of the General Land Office to restrain them from alotting and patenting in severalty swamp lands within the limit of an Indian reservation. The Court further said that it could not interfere with the allotment and patenting by the Land Department of swamp lands within the limits of an Indian reservation while the legal title was still in the Federal Government. In that case the Court stated:

"Now the legal title to these lands is in the United States. The Officers named as defendants have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale,—to divest the Government of its title and vest it in the State. The United States is, therefore, the real party affected by the judgment, and against which, in fact, it will operate, and the officers have no pecuniary interest in the matter. If whether a suit is one against the State is to be deter-

mined, not by the fact of the party named as defendant on the record, but by the result of the judgment or decree which may be entered, the same rule must apply to the United States. The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record, but by the question of the effect of the judgment or decree which can be entered."

The case was decided against the relator on the ground that the Court had no jurisdiction as it was manifestly a suit directly against the United States to seek to restrain it from selling lands that belonged to it; that the Court would not interfere with the Land Department in its administration; and that until the legal title to lands passes from the Government inquiry as to equitable rights comes within the cognizance of the Land Department. The Court stated that it could not anticipate the action of the Land Department, or take upon itself the administration of the land grants of the United States.

Again the respondent says that:

The Courts will not interfere by mandamus with the executive officers of the Government in the exercise of their ordinary official duties, even where those
89 duties require an interpretation of the law. Dunlap vs. Black, Commissioner of Pensions, 128 U. S. 40.

In that case the Commissioner of Pensions adopted an interpretation of the law adverse to relator by refusing a pension certificate, and his decision was confirmed by the Secretary of the Interior. The Court stated that it had no right to review such decision. It declined to interfere by mandamus with the executive orders of the Government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, but held that when executive officers refuse to act in a case at all, or when by special statute or otherwise, a mere ministerial duty is imposed upon them, which they were bound to perform without further question, then,

if they have refused to act, a mandamus might be issued to compel them. In that case the Commissioner of Pensions and the Secretary of the Interior acted in the discharge of a quasi judicial function. This paragraph from the opinion of the Court is sufficient to show that it has no bearing in this case:

Adjudged by this rule the present case presents no difficulty. The Commissioner of Pensions did not refuse to act or decide. He did act and decide. He adopted an interpretation of the law adverse to the relator, and his decision was confirmed by the Secretary of the Interior, as evidenced by the signature to the certificate. Whether, if the law were properly before us for consideration, we should be of the same opinion, or of a different opinion, is of no consequence in the decision of this case. We have no appellate power over the Commissioner, and no right to review his decision. That decision and his action taken thereon were made and done in the exercise of his official functions. They were by no means merely ministerial acts.

The respondent cites the case of Schillinger et al, vs. the United States. That was an appeal from a judgment of the Court of Claims, dismissing a suit brought by plaintiff against the United States to recover damages for the wrongful use of a patent for improvement in concrete pavement. It was nothing more nor less than an action in tort against the United States. The Supreme Court held that the Court of Claims was correct in deciding that it had no jurisdiction of a tort action against the
90 United States, and that without its consent the United States could not be sued.

8. The respondent insists that the relator is indebted to the United States or the Canal Zone as hereinbefore stated. Is this true? Whether it is or not, the relator denies such indebtedness and his case is justifiable and cannot be determined by a mere ministerial officer who has undertaken to decide without the intervention of a Court

or a judge and jury. It seems rather incongruous, to say the least of it, that this auditor should deny his authority and duty to pay the relator his salary and in the next breath assert that he has the authority and the discretion to withhold from the relator $1,131.76 of his salary for the alleged but denied indebtedness.

It is indisputable that the relator does not owe for house rent or electric lights unless there was some law or some executive order in pursuance of an act of Congress which imposed the duty to pay or authorized the collection charges for rent and lights. As a matter of fact there was never any Congressional legislation or any ordinance of the Isthmian Canal Commission, or executive order of the President, or any regulation of the Governor of the Panama Canal, providing for the collection of rent or electric light charges for the occupation of government quarters and lighting the same in the Canal Zone until the promulgation of the executive order of the President of the United States under date of February 2, 1914. Sec. 17 of this order is as follows:

"Where practicable, such bachelor quarters on the Isthmus as may be available from time to time, will be assigned to all employees desiring them. Family quarters when available, will be assigned under such rules as may be prescribed by the Governor, and charges will be made for rent, fuel and electric current, at such times and in accordance with such regulations as the President may hereafter establish."

In pursuance of this provision of the executive order, the President promulgates on January 15, 1915,
91 another executive order in this language:

By virtue of the authority vested in me it is hereby ordered:

1. Pursuant to the provision contained in paragraph 17 of the Executive Order of February 2nd, 1914, fixing the conditions of employment governing employees of

the Panama Canal and the Panama Railroad Company on the Isthmus of Panama, a charge will be made for rent, fuel and electric current on and after March 1st. 1915.

Rent—2. The rental will be based on a percentage of the value of the quarters occupied, the rate percentum to be the same for all quarters, and the value of the quarters to be appraised by the Governor of the Panama Canal. The amount to be collected should be sufficient to defray the cost of maintenance of the quarters and grounds, maintenance and renewal of furniture, collection and disposal of garbage, and for bachelor quarters janitor service. No charge will be made for water.

Fuel 3. Fuel will be sold to employees at cost delivered at quarters.

Electric Current 4. The charge for electric current will be based on the cost of the current delivered to the quarters. When practicable the current used will be measured by meters; otherwise a charge will be made for each lamp or other device installed.

5. Where employees for the good of the service are required to live in certain designated quarters, one-half of the rental will be remitted.

6. When an officer of the Army or Navy is detailed for duty with the Panama Canal, and the amount of extra compensation of the position he occupies over and above his official salary as an officer of the Army or Navy is not sufficient to cover his rent, he will not be charged for rent, but will receive no extra compensation.

7. The Governor of the Panama Canal is charged with the duty of issuing such instructions as may be necessary to carry out this order and to fix and change from time to time if necessary the rates and charges herein outlined subject to the general instructions provided.

8. The free use of quarters, free fuel and free electric current are not, under the conditions of employment now governing, a vested or contract right of employees but revocable privileges, which it has been considered advisable to continue until the permanent force was organized. The revocation of these privileges shall not be made the basis for increasing salaries or wages or otherwise increasing compensation.

This latter executive order became effective March 1, 1915, and was continued in force, and under it rent was charged against employees of the Panama Canal and the Panama Railroad Company for three months thereafter. On May 23, 1915, the President made the following executive order, superseding or suspending the operation of the above mentioned order of January 15, 1915:

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"By virtue of the authority vested in me, it is hereby ordered that the executive order of January 13, 1915, relative to charges for rent, fuel and electric current, furnished employees of the Panama Canal and the Panama Railroad Company on the Isthmus of Panama, is modified by suspending from the operation thereof so much as relates to rent, fuel and lights during the period of actual construction of the Panama Canal but not later than June 30th, 1916."

It must be observed that during the time for which Judge Jackson is sought to be charged for the rent of the residence and for lighting the same there was no statute or executive order authorizing the making such charges and there is no authority for withholding the salary. In other words, prior to March 1, 1915, there was no authority to charge or collect from any one rent for houses or quarters, or for lighting the same, on the Canal Zone. It is manifest that prior to that date it had not been contemplated by Congress, or by the Secretary of War, or by the Canal Zone officials, that rental charges would be made for the occupancy of quarters, and lights, on the Canal Zone. The

houses were erected, not for rental purposes, but for the use of the employees of the Panama Canal, the Panama Railroad, and other governmental functionaries who might from time to time, in the discharge of their official duties, be required to reside in the Canal Zone. The purpose of the United States in acquiring the Canal Zone was to use it as a necessary appurtenance for the construction of the Isthmian Canal—for auxiliary works of canal construction such as abodes for housing employees, and the like. It will not be insisted that it was the intention of the United States to engage in the real estate business for profit, or that there was any intention on the part of Congress that a rental should be charged against judicial or other officers who were obliged to live in the Canal Zone.

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Moreover, the order of March 1, 1915, (above quoted), was the only provision of law for the collection of rents from any one, and that order applied to employees of the Panama Canal and the Panama Railroad, and not to the district judge of the Canal Zone. But treating the judge as an employee then we find that for a period of three months less six days, the executive order authorizing the collection of rent from employees of the Panama Canal and the Panama Railroad was operative and that it was then suspended as to the persons or class of persons to whom it had been made applicable, namely to the employees of the Panama Canal and the Panama Railroad Company. This executive order which authorized the collection of rent from the employees was suspended during the time of the occupancy of the house by Judge Jackson, and for which he is charged rent by the respondent. It must, therefore, be held that there was an absence of authority on the part of any one to make such a charge.

It may be well to remember in this connection that no private persons could erect a house on the Canal Zone for his individual use. The Judge was required by act of Congress to reside in the Canal Zone, and under the circumstances it was not possible for him to do so except by living in one of the houses owned by the Government. That he should occupy such house seemed to have been

understood as being in the contemplation of Congress. In the absence of any legislative expression it cannot be believed that it was the intention of Congress that the judge, whose office was created by the Congress, and who was required to reside in the Canal Zone, should rent quarters from the Government or from any subsidiary governmental agency.

9. But the respondent contends that he has the right to withhold a part of the salary of the judge, fixed and appropriated for by law, because the Adamson
94 Act provides that the judge shall not receive any emoluments except his salary. Pretermitting for the time being the consideration of other phases of the case or questions, let us ascertain the meaning of emoluments. The definition of the term is ascertained from adjudged cases cited in Words and Phrases, vol. 3, p. 2367, where it is said:

"Emolument is the profit arising from office or employment; that which is received as compensation for services, or which is annexed to the possession of office, as salary, fees and perquisites."

I think it may be said, therefore, that an emolument is something positively and directly conferred as compensation or gain that the holder of an office receives and not something necessarily, inseparably and incidentally used by him in the discharge of his duty, a duty for which he is paid a fixed salary. Certainly it would not be contended that an employee, for instance, a locomotive engineer, could be charged for the use of the locomotive which was necessary in the performance of work he was hired to do. We must not forget that it was the expressed intention to have the Judge reside in the Zone, and this intention is just as plain as was the other intention that he should perform judicial work. His physical presence on the Zone was required, and he could not possibly obtain a habitation there except from the Government.

This question here is analogous to the one involved in McCoy vs. Handlin, 153 N. W., 361. In that case the contest was over an extra allowance of a specified sum per month to such judges of the Supreme Court as take up their residence at the capital, (of South Dakota), to meet the extra expenses thereby caused. The Constitutional provisions of the State were that "They—the Supreme Court judges—shall receive no fees or perquisites whatever for the performance of any duties connected with their offices. It shall not be competent for the legislature to increase the salary of the officers named in this article except as hereinafter provided." And,
95 again, that "The judges of the Supreme Court—shall each receive such salary as may be provided by law, consistent with this Constitution, and no such judge shall receive any compensation, perquisite or emolument for or on account of his office in any form whatever, except such salary."

An extra allowance by the legislature of a specified sum per month for such of the judges of the Supreme Court as take up their residence at the capital, to meet the extra expenses thereby caused, was held not to be inhibited by the constitutional provisions quoted. The proceeding there was for mandamus against the auditor for the allowance of a specified sum to such of the judges as had taken up their residence at the capital, &c., and was resisted by the auditor upon the ground that the allowance of such sum per month was in contravention of the State Constitution. The decision of the Court was against the contention of the auditor. The opinion was well considered, instructive and is illuminating in the consideration of the instant case. There it was said:

"It is clear that the legislature did not intend, in the enactment of such legislation to increase the salaries of the judges, or to grant them any perquisites or emoluments for the discharge of their duties, but only intended to assure them insofar as possible that for the performance of their official duties alone, and not for the performance of such duties and the payment of the expenses incident

thereto, they should receive the salaries provided by law for the performance of such duties."

And, again, the Court said:

"These men (the framers of the Constitution of South Dakota) must have known that Sec. 1, art. 2, of the Federal Constitution, declared that the President should receive for his services a compensation "which shall neither be increased nor diminished during the period for which he shall have been elected; and he shall not receive within that period any other emoluments from the United States or any of them." These men must have known that the word "emolument" was, as recognized by every authority, a term broad and comprehensive, one which includes within it "perquisites", "salary", "compensation", "pay", "wages", and "fees". These men must have known that, with the above provisions of the Federal Constitution in force, the Congress of the United States, a body of men which at all times during the history of this government has had among its members many of the greatest constitutional lawyers of the day, had enacted legislation under which the President, for nearly a century prior to the framing of our Constitution, had been furnished a home, horses, carriages, servants, household equipment, and many other things incidental to and appropriate to his high office. These men must have known that such Federal legislation had never been questioned either as regards its propriety or its constitutionality. These men must have known that in practically every state in the Union (in many of which there were constitutional provisions similar to the one above referred to in the Federal Constitution and to the ones relied upon by defendant in this case), there had been legislative enactments making provisions for the several governors similar to those made by the Federal Congress for the President, as well as innumerable measures appropriating money to be paid other officers to recompense them for expenses incurred in the discharge of their official duties. Is it possible for anyone to pre-

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sume that these men, with all these facts in mind, intended, by the words used in our Constitution, to prohibit allowances for expenses incident to the discharge of public duties? Further light has since been thrown upon the construction given to the provision of the Federal Constitution above referred to by the Act of June 23, 1906 (34 Stat. at L. 454, chap. 3523, Comp. Stat. 1913, Sec. 225), which provides: that "hereafter there may be expended for or on account of the travelling expenses of the President of the United States such sum as Congress may from time to time appropriate, not exceeding $25,000 per annum, such sum when appropriated to be expended in the discretion of the President and accounted for on his certificate solely."

Under appropriations thereafter made by Congress, Presidents Roosevelt and Taft received, and to-day President Wilson is receiving, thousands of dollars each year. So far as we know, it has never been suggested that the money so allowed was an "emolument", and therefore unconstitutional. No one has ever seen fit to accuse those Presidents of being grafters. The judges of the Federal Courts, whose salaries are fixed by a law declaring that such salaries shall be the "compensation for their official services", draw from the United States Treasury a sum not exceeding $10 per day when absent from the places of their residence. Act March 3, 1911, chap. 231, Sec. 259, 36 Stat. at L. 1161, Comp. Stat. 1913, Sec. 1236. This allowance is not given as an increase of salary, but to cover the expenses incident to their being away from home in the discharge of their duties."

Paraphrasing, it may be said that the use of the house by Judge Jackson cannot be held to be an increase of salary, but was no more than the necessary inseparable incident to his compliance with his positive duty to reside within the Canal Zone during the term of his office. (Sec. 8, supra, Vol. 37, Part 1, U. S. Stat. at L., 62nd
97 Cong., p. 565). The relator was compelled to reside within the Canal Zone, and necessarily could occupy no house except one furnished by the Gov-

ernment. It seems fair to say that if Congress had intended the judge to pay rent for the occupancy of a house in the Canal Zone, when it required him to reside there, it must be presumed that it would have been so stated in the Adamson Act. The law makers knew that the United States Government was the owner of all buildings in the Canal Zone, and that the judge required to reside there must occupy one of those buildings. By way of reinforcement of this view it may be said that the members of Congress were familiar with the fact that under the acts or ordinances of the Isthmian Canal Commission the former members of the Canal Zone judiciary had occupied houses free of rent. Act one of the Isthmian Canal Commission of August 16, 1904, in referring to each of the Circuit and Supreme Court judges, provided as follows:

"During his term of office he shall be furnished a dwelling house or apartment, or in lieu thereof a sum of money equal to 8% of his annual salary, at the option of the Commission."

The Adamson Act continued in operation all the acts of the Isthmina Canal Commission not repugnant to the provisions of that Act itself. This is shown by section 2, paragraph 2, of the Act as follows:

"That all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide. The existing Courts established in the Canal Zone by the executive order are recognized and confirmed to continue in operation until the Courts provided for in this Act shall be established."

This provision has direct reference to the Courts, consequently, when the Act required the judge to reside within the Canal Zone his occupancy of a house belonging to the Government or its subsidiary, in the Canal Zone, free

of rent, when there had never been any stipula-
98 tion for the payment of rent, cannot be considered an emolument. It was no increase of salary. It was no profit. His occupancy of the house as a residence constituted an incident, and perhaps also an inducement, to the discharge of his duty while away from his home in the United States.

In his letter, introduced in evidence in this case, the Attorney General of the United States, Mr. Gregory, when called upon by the Governor of the Panama Canal and the Auditor, the respondent here, to pass upon the legality or illegality of withholding from the relator his salary, cited with approval the Benedict case, supra, and appropriately said that the question which the Auditor, respondent here, has taken upon himself the authority to decide, and to finally decide, "was one for judicial rather than administrative determination, and that it was a claim that could only be enforced through proceedings in the Courts." Mr. Gregory is not the only Attorney General who has passed upon cases involving this question. On June 27, 1893, Mr. Maury gave the opinion, as to the right of the Secretary of the Treasury to withhold from the salary of a Federal judge an amount which had been adjudicated against him in favor of the United States, in a final judgment, (Ops. Atty. Gen. 22, 626), as follows:

"Sir: It appears by the letter of the First Comptroller of the Treasury of May 27, ultimo, addressed to you, that the United States has recently recovered a judgment in the Supreme Court of the District of Columbia against the Hon. Nathan Goff, as surety on the official bond of James M. Ewing, formerly disbursing clerk of this department, for the sum of $9000.00 with interest and costs, and you have referred the letter to me for an opinon upon the following questions presented therein:

"1. Does the Act of March 3, 1873, (18 Stat., 481), authorize and require the Secretary of the Treasury to withhold the salary due a public officer who is indebted to the United States?

"2. If so, is there any exception in the case of a Federal judge?"

As I may not, however, give an opinion on a hypothetical question without exceeding my power as defined by law, I must, in complying with your request,
99 confine myself to the case calling for the action of your department, and shall accordingly proceed to consider whether the act of March 3, 1875, chapter 149 (18 Stat., 481), authorized and requires the Secretary of the Treasury to withhold Judge Goff's salary as a Circuit Judge of the United States for the Fourth Circuit, until the judgment recovered against him as aforesaid shall have been satisfied in that way.

The Act of March 3, 1875, is entitled "An Act to provide for deducting any debt due the United States from any judgment recovered against the United States by such debtor", and provides as follows:

"That when any final judgment recovered against the United States, or other claim duly allowed by legal authority, shall be presented to the Secretary of the Treasury for payment, and the plaintiff or claimant therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Secretary to withhold payment of an amount of such judgment or claim equal to the debt thus due to the United States."

It would be, in my judgment, to abandon the ordinary sense of language and to adopt an unlooked for interpretation to hold that it was in the contemplation of Congress to include, under the expression "claim duly allowed by legal authority", the right of a Federal judge to have his salary paid to him out of money in the Treasury appropriated by law for that purpose.

The allowance of a claim against the United States, involving a discretion which partakes of a judicial character, but it is apparent that there is no room for the exercise, by any "legal authority", of such a discretion with reference to the salary of a judge, which the law requires to be paid, if there is money in the Treasury applicable

to it, and failure to pay which is an official delinquency which may be summarily corrected by mandamus.

Without going into the constitutional question and the question of policy suggested in the First Comptroller's letter, I content myself with saying that this is not a case where the ordinary sense of the language of the statute should be extended by construction."

In addition, Attorney General Black under date of July 21st, 1858, rendered an opinion, (Vol. 9, Ops. Atty. Genl., p. 198), an excerpt of which reads as follows:

"Though I doubt the power of the Secretary, in the present state of the law to set up a counter claim of any kind in order to avoid payment of a judgment which Congress has ordered him to pay, yet I do not think there would be impolicy or danger of giving him such power, where the counter claim is also a judgment, or where it is established by evidence so conclusive that the opposite party is estopped from denying it. In such a case, he would be required to pass on nothing which is open to dispute. His function would be merely ministerial, consisting in nothing but the substraction of one claim from the other and ascertaining the difference. But here is a claim fiercely contested. It has never been adjudicated in favor of the Government. If it has ever been passed upon by any Court, the judgment was against it. There is not a word on record about it. All the evidence concerning it pro and con is in pais. Every fact asserted by one party is not only open to contradiction by the other, but is in fact contradicted, and I have no doubt is most potently believed to be untrue. Not only are all the facts vehemently disputed, but the parties are as wide asunder as the poles on every question of law. It is proposed that this complicated entanglement shall be settled in the chamber of an executive officer, without a trial, without a judge or jury, without examining witnesses, and without hearing counsel.

No such jurisdiction is given to the Secretary of the Treasury by any law, and if the Constitution is not a dead letter Congress cannot confer it. The fifth amend-

ment declares that "no person shall be deprived of his life, liberty or property, without due process of law." This means, and has always been held to mean, that the right of a citizen to his property, as well as his life or liberty, could be taken away only upon an open, public, and fair trial before a judicial tribunal, according to the forms prescribed by the law of the land for the investigation of such subjects. If an executive officer can make an order that the widow and children of Reeside shall be deprived of twenty-four thousand dollars without a trial, then the same officer may, with equal propriety, issue a warrant to hang them, since the Constitution puts life and property on the same footing * * *

If Congress had power to confer this kind of jurisdiction on the head of the Treasury Department, and would exercise it by passing a law to invest him with all the authority which Courts and juries together are clothed with by any defalcation act ever passed, still the Secretary could not set off this claim against that of Mrs. Reeside. Her demand is res adjudicata—fixed and settled by a judgment—and the payment of it in full is sanctioned by an Act of Congress. The counterclaim of the Government rests on parol evidence disputed and denied. Now, it is well settled that where one party has a judgment the other can never set off against that judgment a claim not reduced to judgment, however clearly he may be able to prove it. He is always remitted to his action.

For these reasons, and for others which might be adduced, I am perfectly satisfied that the Secretary of the Treasury has no power to stop the payment of the money adjudged to Mrs. Reeside, however well he may be satisfied in his own mind that the counterclaim is well founded. If he is convinced of the indebtedness alleged, he should order a suit to be brought, and give the party a fair chance to be heard before the regular tribunals of the country. I am not aware that such power was ever claimed before it was used by the late Secretary in this case; but if it be a practice of the Department it ought to be
101 immediately abolished, for it is unjust, unlawful and unconstitutional."

This language is apposite in the present controversy. As to the force and legal effect of an official opinion of the Attorney General of the United States when rendered to any executive or administrative officer we can do no better than to refer to the opinion, rendered to the Secretary of the Treasury on date of February 12, 1894, by the Attorney General, Richard Olney, (Opinions of Attorney General, Vol. XX, 722) as follows:

"The act of 1870, section 4, establishing the Department of Justice, provided that written opinions prepared by a subordinate in the Department may be approved by the Attorney-General, and that "such approval so indorsed thereon shall give the opinion the same force and effect as belong to the opinions of the Attorney-General." This provision is embraced in substantially the same language in section 358 of the Revised Statutes. Evidently, therefore, Congress contemplates that the official opinions signed or indorsed in writing by the Attorney-General shall have some actual and practical force. Congress's intention can not be doubted that administrative officers should regard them as law until withdrawn by the Attorney General or overruled by the Courts, thus confirming the view which generally prevailed, though sometimes hesitatingly expressed, previous to the establishment of the Department of justice." (3 Opin., 97; 6 Opin., 334; 7 Opin., 699, 700; 9 Opin. 35, 37.)

The question now presented is substantially the same as that presented last summer. The duty of this Department ended with the rendition of the opinion, and it can not with propriety advise further. (17 Opin. 332.)

Mr. Attorney General Gregory was correct in saying that if the authorities in the Canal Zone believe that the relator in the present case owed any amounts of money whatsoever to the Panama Canal it was "a question for judicial rather than administrative determination", and that the claim now urged by the respondent in this case "could only be enforced through proceedings in the Courts." That is a sententious and felicitous statement of this case.

Judge Jackson has never had his day in Court.
102 He has been deprived of his salary, or the sum of $1,131.76, without due process of law. It has been withheld from him by the refusal of the Auditor in this case to issue his voucher upon which the salary is paid. The indebtedness is denied by Judge Jackson. He denies it upon the grounds that there was no law or regulation under which the indebtedness was or could have been created. He denies that the respondent has authority to withhold any part of his pay in the collection of an alleged but disputed indebtedness. And yet the executive officer has sat as a Court and without evidence or hearing, except what he considered evidence, and except what he considered a hearing, decided a controversy that he created by his own action. He has passed upon a disputed claim which is a disputed claim merely because he has created the dispute in refusing to make payment where it was his plain duty to make such payment. His conduct, however good his intention may have been, hardly falls short of being shocking to the judicial sense of justice, proper and orderly procedure, in a matter that is clearly justiciable. Perhaps it is not to be doubted that if, after he had made a careful examination, the Attorney General had found Judge Jackson was indebted, owed the items amounting to the salary which has been withheld by the Auditor, that the account would have been settled without Court proceedings. Or if not so settled then appropriate Court action would have been had for its collection. In any event Judge Jackson was entitled to his day in Court. But the Auditor here held that having the money for Judge Jackson under his control and subject to his disbursement he had the right to determine the claim against Judge Jackson, one disputed in law and in fact, and now insists that his summary way of determining an issue of law and an issue of fact, and the collection by deduction from the Judge's salary of a disputed indebtedness, cannot be reviewed or questioned by the Court. Notwithstanding that view I think the
103 Attorney General was right in saying that the matter "was one for judicial rather than admin-

istrative determination", and that whatever demand or offset that the Government may have "could only be enforced through proceedings in the Courts."

The counsel for the respondent in the oral argument before me insisted that Gratiot vs. The United States reported in 14 Peters, 336, authorizes the respondent to retain as an offset the amount claimed by him to be due from Judge Jackson. The following quotation shows the ruling in that case:

"There is another instruction asked under this exception, in a complicated form, but which mainly turns upon a consideration whether the Treasury Department had the right to deduct the pay and emoluments of the defendant as a General of the Army, and while he was Chief Engineer, by setting them off against the balance reported against him, on account of his superintendency of Forts Monroe and Calhoun. In our judgment, the point involves no serious difficulty. The United States possesses the general right to apply all sums due for such pay and emoluments, to the extinguishment of any balances due to them by the defendant, on any other account whether owed by him as a private individual, or as Chief Engineer. It is but the exercise of the common right which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, to the extinguishment of the debts due to him."

The opinion in that case does not sustain the contention of the respondent that Treasury officials have the right to make deductions from salaries of other officers whenever, in the opinion of Treasury officials, such officers may be indebted to the United States. An examination of the opinion in that case shows that no such broad principle as that contended for was declared. The facts of that case are essentially different from those in the instant one.

General Gratiot was a disbursing officer of the United States Army, and as such he had drawn large sums of money from the Federal Treasury on warrants signed by

himself. He later converted to his own use the sum of $30,000.00 from one of the sums which had been drawn by him for engineering work under construction.

104 In the statement of the Attorney General it was asserted that General Gratiot made no objection to the stopping of his pay. He contended and contended only that the amount of his defalcation should be credited to an account other than that to which the Treasury officials had credited it. He insisted that the $30,000.00 embezzled by him should be charged to a particular account that he favored. The Court decided in effect that the United Sattes had a right to apply the portion of General Gratiot's salary then due and owing to any of the accounts as it saw fit he had admittedly settled, being a defaulter on all of his accounts.

As has been shown, the amount of the relator's salary had been fixed by law and the money for its payment appropriated, and was by the terms of the law in the possession or under the control of this respondent as disbursing officer, and he as such was under the legal obligation to pay, or, under the regulations and practice, to do his part in the payment of such salary. There was nothing left to be determined by his judgment or according to his discretion. The Judge having served as judge the law itself automatically audited and determined the amount to be paid to him. The case of McCoy vs. Handlin, supra, is, I think, in point as I have endeavored to show for there it was said:

"On the other hand where the amount claimed is fixed by the law, as, for instance, an officer's salary, the auditor is vested with no discretion whatever. If he is satisfied as to the identity of the officer claiming a salary it is his duty to issue his warrant for the amount so fixed. In that case there is nothing to be determined by an action at law and, if the auditor refused to issue the warrant, mandamus is a proper remedy to compel him to issue the same."

In Fowler vs. Peirce, 2 Cal., 165-167, the Court said:

"It is true that Courts cannot compel judicial or other officers vested with legal discretion to act otherwise than in the exercise of that discretion. In the present case, it was the duty of the Comptroller to audit the appellant's account. The nature and amount of the services are ascertained, (or not disputed), and the law has fixed a compensation.

The Comptroller, who is bound to know the
105 law by which he is required to act, has no discretion in such a case. Nothing remains to be ascertained. He must audit the account according to the law in force; and it will be no sufficient answer to a mistake or refusal on his part, to say he acted according to his discretion. The act of auditing an account, under circumstances like these, becomes merely ministerial and can be enforced by mandamus."

In State, &c. Collens vs. Jumel, Auditor, 30 La. Ann., 861-864 the Court declared:

"When a judge has acquired his office in the mode designated by the Constitution, he has a vested right to its emoluments during the term fixed by the Constitution for its duration.

The legislature cannot deprive him of it. He may be impeded in the exercise of his judicial functions. He may be shorn of judicial power and be deprived of the opportunity to discharge the duties imposed upon him by the defense of his office, but he cannot be divested of the office except by one of the modes appointed by the Constitution for that purpose, and he cannot be denied his just demand of payment of the salary, which is prohibited from being increased or diminished during his term.

All devices tending to abrasion of the independence of the judiciary, or to subject it to legislative or popular caprice, have been uniformly condemned by the wisest men of our country. Numerous incidents have occurred in the States of attempts of the legislatures to oust judges from their constitutional offices, and deprive them of their

salaries, and in no instance has the doctrine announced in the relator's case in the Twenty-Sixth Annual found any favor - - - - - -

The independence of the judicial department of the Government is at once the anchor of our stability, the prop of our strength, and the shield of our defense - - - The relator is entitled to his salary for the term of his office, not included in his former suit, and the respondent should have audited his claim therefor to the extent of the appropriations, and drawn the warrants upon the Treasury in accordance therewith."

In the case last above cited it appears that the Auditor did not have the funds sufficient to pay the salary of the Judge, but nevertheless, the writ of mandamus issued for such funds as he did have to apply to the payment of the salary of that judge. It apparently had been sought by the Legislature of Louisiana to legislate the relator in that case out of office, and, although the relator, by reason of the act of the legislature, had no judicial
106 function to perform for a considerable period of time, nevertheless, the Supreme Court of Louisiana held that he was entitled to his salary irrespective of the fact that he had not performed the duties of his office, and that mandamus would lie to compel the payment of his salary.

It seems to me that upon reason and authority, when the salary has been fixed by law and the money appropriated for its payment, that the officer who controls the funds refuses to pay the salary to the one entitled thereto, mandamus is the proper remedy and the only remedy which the aggrieved party can invoke for the protection and enforcement of his rights.

Counsel for the respondent cited the case of Butterworth vs. United States, U. S. 656, 50-69, in support of his contention that mandamus would not lie in the present case. That case not only does not support this contention but it expressly negatives it. There the superior of the Commissioner of Patents, the Secretary of the Interior, had overruled the Commissioner, who had already exercised

his jugdment and discretion in deciding that the relators were entitled to a patent. The Supreme Court of the United States stated that irrespective of the action taken by the superior of the Commissioner the writ of Mandamus would lie, directing him to issue the patent. The Court said:

"Some question is made as to the remedy. We think however, that mandamus will lie and that it was properly directed to the Commissioner of Patents. He had fully exercised his judgment and discretion when he decided that the relators were entitled to a patent. The duty to prepare it, to lay it before the Secretary for his signature and to countersign it, were all that remained and they were all purely ministerial. These duties he had failed and refused to perform merely out of deference to the claim of the Secretary to reverse and set aside the decision on the merits in favor of the relators. This we have held not to be a valid excuse.

10. It will be noted that the respondent has withheld $88.33 of Judge Jackson's salary for five days' absence from the Canal Zone in excess, as it is alleged, of the
107 six weeks' annual vacation allowed under the Adamson Act. It is thus seen the respondent was under the misapprehension that Judge Jackson was to be classed as a day laborer, and that it was his duty as auditor, so he contends, to "dock", to use the respondent's language as a witness on this trial, Judge Jackson's salary on account of alleged absence. Of course any laborer is respected, for labor is honorable, but the judge was not engaged to work by the hour or day. It is sufficient to say that the Act of Congress provided that Judge Jackson should be paid an annual salary of $6,000.00 just as United States district judges are paid, and he was given by statute an annual leave of six weeks; and that this does not preclude the idea that he could lawfully have a longer leave of absence. Undoubtedly he could have been granted a longer leave, and undoubtedly the Judge could not be deprived of the six weeks allowed by the statute. If without authority Judge Jackson absented him-

self from the Canal Zone for a period of time not permitted the remedy for such dereliction was not committed to the judgment or authority of the respondent. For such an excess the Judge was amenable to the President, with his power of removal, or to Congress, with its power of impeachment.

The Adamson Act does not provide for vacation for the marshal or the district attorney, and yet they have taken their vacations and the respondent made no deduction from the salary of either on that account. Presumably he did not make any deduction because they perhaps, took leave or vacation by the consent of some executive functionary. It is rather strange, to say the least of it, that this respondent should now insist he has the right to withhold a part of Judge Jackson's salary for five days' absence in view of the fact he was informed that the Attorney General, the head of the Department of Justice advised that the Judge's explanation, as to why he
108 had been absent for the brief time mentioned was entirely satisfactory. And, moreover, it is stranger still that this respondent should withhold the five days' pay from the Judge in view of the fact that the Comptroller of the Treasury, upon whom the respondent says he relied for direction, never advised him to make any such deduction.

I do not believe that law or propriety justified the respondent in this case to exercise the espionage or petty supervision over the time, services, and whereabouts of the Judge as was shown by the testimony on the trial. The testimony in the case warrants the statement that the judge was faithful, efficient, and independent in the discharge of the duties of his office. And testimony introduced at the trial without objection, showed that Judge Jackson had so properly and fearlessly adjudged in a case before him as to bring forth, from the respondent, a published criticism upon the decision by the Judge in that given case. But the Judge was independent of him, and if he is to continue to be independent of the respondent, as a judge ought to be, he should not be subservient to the respondent for his salary or compensation.

In deducting $83.33 from the salary, for the alleged five days' absence of the Judge, the respondent exceeded his authority.

My conclusion is that the withholding of $1,131.76 of Judge Jackson's salary was without authority of law; that it is the duty of respondent to issue his warrant or pay voucher for the same; that mandamus is the proper remedy to compel the respondent to perform this ministerial duty; and that, therefore, the peremptory writ of mandamus must be issued as prayed for.

It is accordingly adjudged and ordered.

111 and in accordance with the said opinion the Court finds the issues in favor of the relator and against the respondent and orders that the writ prayed for shall issue and thereupon final judgment herein is entered and the writ issued which is in the words and figures following:

WRIT OF MANDAMUS.

United States of America.

Panama Canal.

In the District Court of the Canal Zone: Balboa Division.

William H. Jackson, Relator,

vs. No. 107 Civil.

H. A. A. Smith, Auditor of the Panama Canal, Respondent.

To the Auditor of the Panama Canal,
H. A. A. Smith, Auditor of the Panama Canal:
Greeting:

This cause coming on to be heard by the Court, and without a jury by agreement of the parties, upon the Petition for Writ of Mandamus, the Amended Petition for

Writ of Mandamus; the Answer of the Respondent; the Reply of the Relator, the Amended and Supplemental Petition for Writ of Mandamus, and the Answer of the Respondent thereto; and after argument of counsel, and the Court being fully advised in the premises, it is considered, ordered and adjudged by the Court, that the Respondent, the Auditor of the Panama Canal, has unlawfully withheld from the salary due to the Relator as Judge of the District Court of the Canal Zone, the following sums:

For the month of December, 1914	$170.07
For the month of January, 1916	66.66
For the month of March, 1916	500.00
For the month of April, 1916	341.97
For the month of May, 1916	53.06

It is further considered, ordered and adjudged by the Court that the total sum, $1,131.76, above mentioned, is a part of the salary due to the relator as Judge
112 of the District Court of the Canal Zone, hitherto appropriated under an Act of Congress, and that the relator is entitled to receive and be paid the full sum of the annual stipend appropriated by the Congress as aforesaid, in monthly installments of $500.00, and that it was the legal duty of the Auditor of the Panama Canal, the Respondent herein, to issue, audit and deliver to the relator the warrant, voucher or paycheck for the payment of the salary and the above amount due to the relator, and to cause the said warrant, voucher or paycheck to be paid by the Paymaster of the Panama Canal to the relator, and to do and perform any and all other acts and things by law required of the said Auditor of the Panama Canal the Respondent herein, in the performance of this ministerial duty, to the end that the said William H. Jackson, Judge of the District Court of the Canal Zone, the relator herein, may receive and be paid the salary and the above amount to which he is legally entitled by reason of his office and the appropriation made by the Congress for the payment of the same.

And it is further considered, ordered and adjudged by the Court that the funds appropriated by the Congress for the payment of the salary of the relator herein are now in the custody or under the control of the Auditor of the Panama Canal, the Respondent herein, and that the said Auditor of the Panama Canal, the respondent, is charged with the duty of disbursing said funds in the manner required by law, and that the said Auditor of the Panama Canal, the respondent has neglected, failed and refused to perform his ministerial duty enjoined by law; and it is further considered, ordered and adjudged by the Court, being of the opinion that the relator is entitled to the relief prayed for in his petition, and therefore, you, the said Auditor of the Panama Canal, the respondent herein, are hereby commanded and enjoined that immediately upon the receipt of this writ, and without delay, you audit, issue and deliver to the said William H. Jackson, as the Judge of the District Court of the Canal Zone, the relator herein, the warrant, voucher or paycheck for the sum of $1,131.76, unlawfully withheld by the Auditor of the Panama Canal, the respondent herein, from the salary due to this relator, and to cause the same to be
113 paid out of the funds appropriated by the Congress as aforesaid; and it is further considered, ordered and adjudged that you certify perfect obedience and due compliance with this judgment and mandate to this Court at its session to be held at the hour of 10 o'clock in the forenoon of Tuesday, the 18th day of July, A. D. 1916. And it is further ordered that the relator recover his costs in this behalf.

Herein fail not.

Witness the Honorable Henry D. Clayton, United States District Judge for the Middle and Northern Districts of Alabama, presiding in the District Court of the Canal Zone by designation of the President under the Act of Congress approved August 24, 1912, this 11th day of July A. D. 1916.

(Signed) H. D. CLAYTON,
United States District Judge.

to which said findings and judgment the respondent excepted and thereupon counsel for respondent in open Court gave notice of his intention to apply for a review to the findings and judgment of the Court by writ of error to the Circuit Court of Appeals for the Fifth Circuit and the respondent is given until July 18th to file his bill of exceptions and application for writ of error.

MARSHAL'S RETURN OF WRIT.

United States of America.

In the District Court in and for the Division of Cristobal District of the Canal Zone.

William H. Jackson, Relator,

vs. No. 107 Civil.

H. A. A. Smith, Auditor of the Panama Canal, Respondent.

Marshal's Return of Writ of Mandamus.

The within writ of mandamus was served by me at Balboa Heights, Canal Zone, on July 12th, 1916, on Ad. Faure, the Acting Auditor of the Panama Canal, by delivering to him a true copy of the writ. H. A. A. Smith,
114 the Auditor of the Panama Canal, Respondent above named, cannot now be served with the writ by reason of his absence from the Canal Zone.

(sgd) WM. H. MAY,
Marshal for the District of the Canal Zone.

(sgd) By JOHN H. POOLE,
Deputy Marshal.

Filed July 13th, 1916, by the Marshal with his return, in the office of the Clerk of the District Court, Canal Zone.
(sgd) E. M. GOOLSBY, Clerk.

MINUTES OF JULY 18th, 1916.

William H. Jackson, Relator,

vs. ss No. 107 Civil.

H. A. A. Smith, Respondent.

On this 18th day of July, 1916, this cause coming on and the parties thereto being present in Court by counsel comes now the respondent and present to the Court his bill of exceptions which is duly signed by the Court, and counsel for relator in open Court having waived citation and notice of suing out of application for writ of error and the respondent having presented his petition for writ of error and assignment of errors the Court allows the application for writ of error on the filing of a bond in the sum of $500.00 and now comes the respondent and files his bond which is approved by the Court and supersedeas issued.

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115 United States of America.

Panama Canal.

In the District Court in and for the Division of Balboa, Canal Zone.

William H. Jackson, Relator,

vs.

H. A. A. Smith, Respondent.

Mandamus

BILL OF EXCEPTIONS

Charles R. Williams, Attorney for Respondent.

Filed July 18, 1916.

116 BILL OF EXCEPTIONS.

United States of America

Panama Canal

In the District Court in and for the Division of Balboa, Canal Zone

William H. Jackson, Relator,
vs.
H. A. A. Smith, Respondent.

Mandamus.

Be it remembered, that on the 13th day of June, 1916, the above-entitled cause was called for trial in the District Court of the Canal Zone, in the Balboa Division, at Ancon, Canal Zone, before the Honorable H. D. Clayton, United States District Judge of the Middle and Northern Districts of Alabama, presiding, without a jury, and the following is the evidence adduced upon said trial:

WILLIAM H. JACKSON, relator, being first duly sworn, testified as follows:

My name is William H. Jackson. I am a lawyer by profession. I reside at Ancon, Canal Zone, and I am at present Judge of the District Court of the Canal Zone. I first came to the Canal Zone in April, 1911, in the capacity of Judge of the District Court at Cristobal, which was equivalent to the Magistrate's Court now. I filled that position from April 18, 1911, to about the 21st day of September 1911. I was then appointed Associate Justice of the Supreme Court of the Canal Zone, and filled that position from September 28, 1911, until July 1, 1914. As an Associate Justice of the Supreme Court I was also ex-officio Judge of the Circuit Court at Empire. I was appointed Judge of the District Court of the Canal Zone on March

2, 1914, and confirmed by the Senate May 1, 1914. Mr. Warwick, now Comptroller of the Treasury, and Mr. Williams, now District Attorney, were the two principal applicants for the place besides myself. My commission is dated May 1, 1914, and on the 1st day of May, 1914, I took the oath of office as Judge of the District Court of the Canal Zone and assumed its duties. Since that time the pay checks for my salary have come to me through the Paymaster's Office, but always by direction of Mr. Smith, the Auditor, and respondent in this case.

While I took office as District Judge on the first day of May, 1914, I, at the same time, acted as an
117 Associate Justice of the Supreme Court of the Canal Zone until July 1, 1914, and we wound up the business of the old Supreme Court. I received no salary for that. I volunteered my services and saved the Government about three or four thousand dollars. I served every day and took part in the writing of decisions by the Supreme Court.

On occasions when I failed to receive my full salary as District Judge of the Canal Zone I always addressed written protests to and filed them with Mr. Smith, the Auditor, and respondent. I have not at any time been notified by any official in Washington with reference to the payment of my salary.

I once wrote to the Comptroller of the Treasury and asked him if he would please kindly advise me as to what he thought my status was down here, and he wrote back and notified me he did not think I occupied a position of sufficient importance to warrant an official action.

While I was Judge of the Supreme Court I did not receive the accumulation which was allowed the other Judges. Under the law, if a person has served a year, he would be entitled to receive a certain amount of cash as cumulative leave. Mr. Smith, the Auditor, and Mr. Warwick, the Comptroller, decided that Judges Gudger and Brown, the other Judges of the Supreme Court, were entitled to receive their accumulation up to the first of July, but that my accumulation stopped on the first day of May, and that I was not entitled to receive the same accumula-

tion up to the first day of July as Judge Gudger and Judge Brown, although I was doing business for nothing. No reason whatever was given. I have frequently asked for an explanation, but have never received one.

Then during the two months that I acted as Judge of the Supreme Court without compensation and without receiving accumulation, Judges Gudger and Brown had their houses free of rent, and electric light free, and I was charged for rent during that time and they took it out of my salary. I was charged for rent and electric lights for the two months, May and June, while I was performing the duties of Judge of the Supreme Court without compensation.

I was told that Mr. Smith, the Auditor, and Mr. Warwick, the Comptroller, were responsible for that action. The best information I could get as to the reason of this action was that inasmuch as I was the District Judge of the Canal Zone I could not receive any emoluments. I do not know by what right they said that. The letter which you hand me, marked Exhibit "A", was written by me to Mr. Smith. I deposited it in the mails addressed to him. I am sure he got it, but I never received any reply. I again wrote to him on the 23rd day of April, asking for a reply, and this Exhibit "B" is the letter I wrote him. To this I received a reply, which is marked Exhibit "C". This letter is signed by Mr. H. A. A. Smith.

I have received another communication which would indicate that Mr. Smith was acting as final Auditor of Accounts. I will have to explain. I wrote to the Attorney General of the United States asking if I could have leave of absence for sixteen days in December, and he asked me to please advise his department the day I left and the day I got back. I sent Mr. Smith a copy of it and said the Attorney General asked me to report to him, and therefore I asked if it was necessary to report to him, and Mr. Smith replied that if I wanted my money I should report to him, the Auditor, Mr. Smith. I believe that both Mr. Smith and Mr. Warwick decided that the Marshal and the District Attorney were higher officials of the

Government and as such they were entitled to
118 all the leave they wanted without deducting from their salaries, and not required to report their going and returning; but that the Judge was required to carry his time on the time roll and report each day. That is the absolute truth.

I performed the duties of Judge of the District Court during the month of December, 1914, but I did not receive the full salary to which I was entitled. The sum of $170.07 was deducted therefrom. I understand that this deduction was for an imaginary claim they had for rent, that is rent of House No. 118 Ancon, from the first day of May, 1914, to the seventeenth day of October, 1914, during which most of this time I was acting as a Justice of the Supreme Court without compensation. I used and occupied House No. 118, Ancon, from May 1, 1914, to October 17, 1914. I was not in possession of this house prior to the 1st of May 1914.

I performed the duties of my position during the month of March, 1916. I did not receive any of my salary at all for that month. The entire salary was deducted. It was deducted on account of the same imaginary claim which they seemed to have against me for the payment of rent which no one else pays, except, I believe, Mr. Williams, the District Attorney, and Mr. May, the Marshal, Mr. Smith, the Auditor, has never paid any rent, nor the Governor, nor the Vice-Governor, or no other official. It has been the custom of this Government to furnish quarters to employees free.

I performed my duties during the month of April, 1916. I received some of my pay for that month. There was deducted from my salary for that month the sum of $341.97. During this month of April I performed my official duties every day except one day, which was Saturday following Good Friday; and being tired, my wife and I decided we would go to Bocas del Toro, being away Good Friday and Saturday, and for this absence on one day, Saturday, Mr. Smith deducted $16.67 from my salary.

I performed the duties of my office during the month of May, 1916, every day. For the month of May there

was deducted from my salary $53.06. Mr. Smith, the Auditor, became aware of my absence in April because he has a very large detective force in the department. I left here at five o'clock on Thursday afternoon, after holding Court all day in Cristobal on Thursday, so my wife came over and joined me Thursday, and the next day, Good Friday, we went away and spent Good Friday and the following Saturday, and got back the next Monday morning; and when I got back I found the Auditor had made a deduction from my salary for that day. I do not report to anybody for my duties. I would not insult my position by doing that; but as Mr. Smith so arbitrarily insisted upon it, Mr. Goolsby, the Clerk, has been called upon to report my time.

There was deducted from my pay for the month of January, 1916, the sum of $66.66, on account of absence for a period of four days during that month. In regard to my vacation, I have always been hampered from the first down here, on account of the fact that it seemed impossible to get a judge to come down and relieve me. I wanted to go away on vacation and wrote to the Governor, asking him if he would ask the Washington authorities to designate a judge to come down. The Governor declined to do so on the ground that I did not belong to his government, and I wrote the Attorney General, and he replied that it was impracticable; and I went away in 1914 for a period of six weeks and when I got back I found an accumulation of business. I have never had any judge to relieve me. The Governor refused to ask for one. No one has come down, and when
119 I came back I found a distressing condition of affairs and prisoners in jail awaiting trial. I was submitted to a great deal of criticism, and a certain member of the Bar had criticised the Judge and published it in the paper. The next time I attempted to take a vacation was in July of last year. I wrote to the Attorney General and told him that I was going and stated that as he found it so inconvenient to send down a judge I would get back as soon as I could. I went to New York in July last, 1915, and had hardly arrived there before I was set

upon by a lawyer by the name of Elihu H. Kemp, with offices in the Woolworth Building. It seemed he had cabled down here to find out where I was, cabled to Washington, and the Secretary of War, and then finally through a brother of mine, who lives in Atlanta, he found out where I was in New York, and then found me, and from then on made my life a burden. Down here there was a man by the name of Ott, who was awaiting deportation. However, this lawyer was insistent that this man should be brought back, and I never moved in the country without this man back of me. He said, "You must go back, or this matter will be reported." I tried to persuade the man. I said I worked hard and was entitled to a vacation, and he said yes, but this man had defaulted with the sum of some forty thousand dollars, and if you do not go back and see that the man is returned, it will be very dishonorable; and I cut short my vacation, left New York after having been there twelve days, and came back here, only to find that the man had volunteered to go back and that it was all useless so far as I was concerned.

I then figured I had sixteen days leave of absence coming to me, and I wrote the Attorney General, asking him if I could go away about November, and he said I could. I then wrote to Mr. Smith and asked him if I must report to him, and he said I must report to him every day if I wanted to get my money. My plan was to leave here the first of December, and go to Costa Rica and then to Havana and come back here in sixteen days. Unfortunately my wife received a cable that her mother was ill, so we changed our plans, and instead of going to Costa Rica we sailed on the twelfth for New Orleans. She went immediately to Cincinnati to be with her mother and I went to Atlanta, to be with my brother, so it necessitated a change of plans and required me to be away about four days over the sixteen days that were due me. Those are the circumstances as I have explained them. Then I wrote to you, Mr. Fairman, a long letter of explanation, and I wrote Mr. Smith a letter of explanation and said it did not seem fair to deduct from my salary, and Mr. Smith wrote back that he would deduct it, as he had no other recourse.

I do not owe The Panama Canal or the Government of the United States any sum whatever, nor did I owe The Panama Canal nor the United States Government anything during the months of December, 1914, January, 1915, March, 1916, April, 1916, and May, 1916, except a doctor's bill, which I paid.

They claim that I owe a back bill for rent, but I have explained that. I have demanded of Mr. Smith, the Auditor, the issuance of the warrants for my pay checks so often that I have gotten tired of it. He has never offered to pay the warrants.

My entire salary for the month of February, 1916, was deducted. When that was done I went to the Acting Governor—Harding, and complained and said: "Governor, I do not want them to do that. I will do anything to settle this matter—anything in the world, but this is unfair. Mr. Smith has no right to do it." And the Governor said: "Very well, I have just got back. I have not got the time to look into it, but I will give you a reply by telephone." At the same time I arranged to go ahead and bring suit, because the papers were practically prepared, and the next day Governor Harding called me up and stated that he had instructed the Auditor to pay me. I was paid my salary for that month, and the Governor said he had instructed the Auditor to pay it and that it would be paid; but that he would have to submit it back to Washington to the Comptroller and Attorney General, and what he heard from them would be the course that he would pursue.

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The bills which were rendered to me on account of rent and electric light included the entire year of 1915. No deduction was made, I believe, from my salary during the year 1915, but they allowed the rent to run along for two or three years.

Cross Examination.

Before coming to Ancon I lived at Culebra, Canal Zone, from March, 1912, to the 1st of May, 1914. That was during the construction period of the Canal. The new organiza-

tion under the Adamson Bill was put into effect the first day of April, 1914, The period from 1904 up until April 1, 1914, was known as the construction period, and then on April 1, 1914, the Isthmian Canal Commission, together with the old organization, was abolished and the new organization put into effect. During the construction period from 1904 to April 1, 1914, no rent was charged.

I moved to Ancon in May, 1914, and had not paid any rent up until that time, nor had anyone else. I paid rent for my house in Ancon for March, April, and May, 1915, when there was a law requiring it. I think the agitation about rent commenced just after the passing of the Adamson Bill, which was approved August 24, 1912, and which provided that employees should not receive more than 25% more than the same salary paid for similar positions in the United States.

On February 2, 1914, by an Executive Order of the President it was stated that a charge would be made for rent, fuel, and electric current, and it was considered that rent for quarters was to go into effect at an early date, or soon after it was promulgated and everybody considered that it would go into effect the first day of May, 1914. I am not certain, not later than July, and if it did not go into effect it [in] July, it would go into effect in December, and at latest, January 1915, and as a matter of fact the President issued an Executive Order in January, 1915, declaring that it would go into effect on the 1st of March, 1915. Under these orders it was required that everybody should pay rent.

As I understood it, the order was withheld originally because of the difficulty of the committee here to arrive at the basis. A committee of three, consisting of Mr. Rousseau, of the Canal Commission, R. E. Wood, general quartermaster, and Major Grove, construction quartermaster, were instructed to get up a general scale of rent applicable to the Canal Zone and to arrive at the basis upon which rent should be charged; and I understood that the matter was deferred from time to time, first from April 1, 1914, to July 1, 1914, then to December 1, 1914, and then to January 1, 1915, because of the task of getting

up this scale, and I heard about agitation against the matter by employees here.

I do not know about any order promulgated by the Governor of the Canal Zone and the Chief Quartermaster holding up rent charges, nor am I familiar with the circular issued by the Chief Quartermaster on this subject.

When I came to live at Ancon I lived in what is known as the Cooke house, No. 118, Ancon. This house belonged to the Government. The Government
121 owns all the houses and there are no residences available to employees or officials here except quarters owned by the Government. This house was very insufficient as compared with what other officials, like Mr. Smith and Col. Mason, have. They had very comfortable houses of the type of the Governor's old residence, and it occurred to me that the Judge ought to be given a house practically the same. The Cooke house was the only residence available at the time I came, and I do not criticise that,—it was the only unoccupied house in Ancon and the only house available. I was furnished the house and fuel and electric light by the Government the same as was furnished to everybody else. I do not know the rental value of the Cooke house.

I was assigned the house commencing from the 1st of May, 1914, without a word being said about my being compelled to pay for it; simply put in there or assigned to it by Capt. Wood. He said there is your house and I went in, as I thought, on the same basis as everybody else, that is rent free. I am not familiar with prices paid for rent of similar houses, and I do not know what its rental value per month is. I occupied the Cooke house from May 1, 1914, until October 17, 1914. During that time I occupied the house with my wife and family and was furnished the fuel and light. I returned from vacation on December 1, 1914, and I moved into the house I am now occupying, which is known as the Rousseau house, and have been living in that house since then. It is the same type of house occupied by Mr. Smith and is like the one formerly occupied by Governor Metcalfe. It is a two story house. I do not know how many rooms,

but there are five bedrooms, and it is a nice and comfortable house. I am told that it has one hundred and twelve electric lights in it. That is the usual number for that type of house, but when the rent and light question came up I cut out all of them except about twenty.

I can not say what the rental value per month of the house is. If it were in Atlanta, it would be worth $75.00 or $100.00 per month, depending on location. The location of my residence is very desirable. I am satisfied with the house, but when I heard that rent was going to be charged, I wrote to Acting Governor Morrow and told him I could not afford to pay that rent and to let me move or give me a cheaper house, and if he had done that, I would have dropped the whole thing. He did not give as a reason that there was no other house available, but said it was contrary to the rules and regulations for a man in my position to live in cheaper quarters. I would have done anything to compromise, as it has been so disagreeable and embarassing. I wrote to Governor Goethals, reminding him that as nobody else was paying rent except Mr. Williams, the District Attorney, and Mr. May, the Marshal, and asking that he give me a small residence and that I would drop the whole matter.

Nobody is required to pay rent except the Judge, District Attorney, and the Marshal. I will try to explain the discrimination. Mr. Smith seemed to conceive the idea that because the Adamson Bill said the Judge, District Attorney, and the Marshal should receive fixed salaries and should not hold any other office nor receive emoluments, that we ought not to have houses without rent, and he wrote to the Governor that we should pay rent. Mr. Smith conceived the idea and put the proposition up to the Governor, and among other things said that I could not receive the accumulation that Judge Gudger had received. The Governor submitted Mr. Smith's recommendation to the Comptroller of the Treasury under date of June 1, 1914. He simply determined the matter in a way, and this Mr. Warwick, Acting Comptroller of the Treasury, wrote an opinion to the effect that that we could not receive houses free from rent, that is

we three could not, and from that time on they have insisted upon our so doing. The Comptroller
122 of the Treasury did not cite any law in his opinion. He decided that arbitrarily. The opinion was rendered by Comptroller Downey, but it was initialed "W".

I was not charged any rent until the matter had been submitted to the Comptroller, but I do not think he had any right to rule on that question. The question of my paying rent was not acted upon by any body here until it had been referred to Washington. I think the matter was referred to Washington three different times.

The opinion of Mr. Warwick, the Comptroller, was that under the Adamson Act rent, fuel, and lights constituted an emolument, and that is the basis for the charges. If everybody had been required to pay rent, I would have made no complaint. I would have been perfectly willing to pay $25.00 per month for the Cooke house or $50.00 a month for the Rousseau house, if everybody had been required to pay rent. As a matter of fact, I did pay for three months while the Executive Order requiring rent was in effect. I objected to paying rent for the other periods, because I thought I was illegally discriminated against.

The matter of the payment of rent by the Judge, District Attorney, and the Marshal was up for consideration a long time, and nothing was taken from my salary on account of these charges until December, 1914. In the meantime the matter had been acted on at Washington and many opinions were asked for. I don't think it made any difference in law what construction the Comptroller put upon it, as it was extra-official. There are legal decisions absolutely in point to show that the use of a residence of a judge is not an emolument any more than the use of the White House by the President of the United States is an emolument.

The question of my vacation of six weeks also came up in the same way. The Adamson Bill provides for six weeks vacation, but it does not say that I shall not have any more than six weeks, and it does not say that if I took more, Mr. Smith would deduct it from my salary. I

suppose the Attorney General can fix that as he sees fit. The question of my vacation was also referred to the Attorney General and to the Comptroller. The Comptroller wrote back and said that I was not of sufficient importance to require an official opinion. (Witness reads two letters, afterwards introduced in evidence as Relator's Exhibits "E" and "F".)

I wrote to the Attorney General about his holding the $66.66, deducted on account of my being absent more than six weeks on vacation, and he wrote that the matter was a question to be settled judicially. (Witness reads a letter from the Department of Justice, dated February 1, 1916, and afterwards introduced in evidence as Relator's Exhibit "G".)

At the same time I gave the Attorney General a full explanation of my absence by letter. (Witness reads two letters, the first addressed to the Attorney General explanatory of witness' absence on vacation, and the reply thereto from the Attorney General, dated January 28, 1916, and afterwards introduced in evidence as Relator's Exhibits "E", "F", and "H".)

I wrote to Mr. Smith, the Auditor, on March 18, 1915, asking for an opinion or decision as to whether or not I was entitled to the same accumulation of pay as Justices Gudger and Brown. I received no reply from Mr. Smith, the Auditor, and wrote him again, and he did not reply, but I received a letter from the Governor, referring to my letters to Mr. Smith and saying that the matter had been referred to the Comptroller. It may be that the letter of the Governor explains why the Auditor did not reply to me,

In am familiar with the decision of the Comptroller of June 23rd. on that question. I still don't understand the reason for the decision. The old organiza-
123 tion terminated on May 1st, but my services as a member of the Supreme Court continued until the 1st of July. I am familiar with the opinion of former Attorney General McReynolds to the effect that if I should continue on as Judge of the Supreme Court, I could not receive compensation for it; and as before stated,

I volunteered my services and did the work for nothing. The accumulated pay of Judges Gudger and Brown was in the nature of a bonus. That is under the rules here you are entitled to certain vacation time for a year or part of a year, and if you did not take that vacation time, you could get pay for the unused vacation time at the same rate of pay as your regular salary. I received my accumulated pay up to the 1st of May, 1914, but I contended that it ought to run up until the 1st of July, 1914, and not stop at the 1st of May, 1914, because I acted as Justice of the Supreme Court up to July 1, 1914.

The place where I went for a few days in April, 1916, and for which absence one day's pay was docked from my salary, was Bocas del Toro, in the north-eastern part of the Republic of Panama. I do not think it is the practice here of higher officials to give an account of their whereabouts. I think it is with a certain class of clerks. Under the Isthmian Canal Commission organization the Clerk of the Court kept my time, as I was then an employee of the Isthmian Canal Commission; but when the new organization went into effect, I gave the Clerk no instructions with reference to keeping my time. I think the Clerk has to report his own time and the time of the reporter and other clerks in the office. If my time is not reported by the Clerk, there would be no check upon my six weeks' leave of absence except my report to the Attorney General of the United States. In making up the pay roll the information could come from the Attorney General's Office as to my absences.

Judge Feuille, Special Counsel, rendered an opinion that I was under the jurisdiction of the Department of Justice, that is belonged to that Department and not down here. It will be seen from his letter that he said please report your leaving and returning to that office. (Letter afterwards introduced in evidence as Relator's Exhibit "K".)

I heard that while I was away at Bocas del Toro that an application was made on Saturday for Habeas Corpus, and as soon as I returned on the following Monday I took the matter up immediately.

The first knowledge I had of the Comptroller's decision that the District Judge, Attorney, and Marshal were liable for rent under the construction placed on the Adamson Bill was by a telephone message from Mr. McIlvaine, the Executive Secretary. The Governor in his letter of June 1st, submitting that question to the Comptroller, said that the matter must be decided quickly and requested the Washington Office to cable the result, so the cable message reached here a considerable time before the arrival of the Comptroller's letter and decision, and I received a phone message from Mr. McIlvaine that this letter of the Comptroller had been received. (Witness reads letter from Comptroller Downey dated June 23rd, afterwards introduced in evidence as Respondent's Exhibit No. 3.) I told Mr. McIlvaine that I thought it was very unjust and very unfair, and he replied: "Really, Judge, it does not make much difference, as the general order is supposed to go into effect about the middle of July."

This conversation with Mr. Ilvaine was about the 15th or 20th of June, 1914. The decision of the Comptroller was dated June 23, 1914. No notice had been given to other employees that they would be required to pay rent at that time, and I understood that this decision of the Comptroller related solely to the District Judge, District Attorney, and the Marshal, regardless of any other employees of the Canal Zone so far as I know.

I wrote to the Governor on this subject both
124 before and subsequent to this date, and I think on May 26th. The letters show that I made application by the first of January, 1915. (Correspondence afterwards introduced in evidence by Respondent.)

In the meantime the decision of the Comptroller of June 23rd was rendered. I do not recall my letter of June 5, 1914, to the Auditor, but I do recall my letter of June 27, 1914 to the Governor, and of June 29th to the Governor. (Letters of June 5th, June 27th, and June 29th afterwards introduced in evidence as Respondent's Exhibits Nos. 2, 4, and 5.)

I do not think I ever received any reply from the Governor to the letter of June 29th. That letter was written

with the understanding on my part, and in view of the communication made to me by Mr. McIlvaine, the Executive Secretary, that the general rental order was going into effect on the 1st of July. That is it would go into effect long before I could ever receive an assignment to the Bishop house. My application for the house and agreement to pay the rent followed the decision of the Comptroller of June 23, 1914, but my letter of June 29th would never have been written except in view of the general understanding of every employee here that there was to be an Executive Order requiring the payment of rent by every employee in the Canal Zone.

I don't think that the Comptroller's decision decided that regardless of other employees the Judge, the District Attorney and the Marshal would be required to pay rent. Considering that after the Executive Order was promulgated and the statement that the scale was going into effect about July 1st, and then about November, and then certainly not later than January, 1915, I had made application for the house, asking for it by the first of January; and knowing that Mr. Rousseau and fanily were in there and I could not get in there until January, it never occurred to me that I could be put into the house until the putting into effect of the general order requiring everybody to pay rent, and what I meant by paying rent was that the rental to be fixed by the Governor was applicable to everyone. And I wrote on July 11, 1914, asking the Governor to please give me a reply, and he never replied to it. (Letter of July 11th, afterwards introduced in evidence as Respondent's Exhibit No. 6.)

I wrote to Capt. Wood on the subject on September 25th, after receiving a letter from him dated September 24th. (Letters afterwards introduced in evidence as Respondent's Exhibits No. 9 and No. 10.)

My understanding of the letter from Capt. Wood fixing a rental of $25.00 per month, inclusive of lights, for the house I was then occupying, was as follows:

Capt. Wood and I lived together in Culebra and we had several conversations and I understood from him that he was a member of the committee composed of Mr.

Rousseau, Major Grove and himself, who were getting up a scale of prices for all officials or employees of the Canal Zone, which scale of prices was to be made applicable to all when the President's Executive Order requiring the payment of rent was put into effect. In the several conversations I had with Capt. Wood, and I remember one in particular in going from Panama to Cristobal on the train, and that conversation was as to what was to be the scale of prices, he said that the Governor has referred the matter to the committee, and also referred the assignment of the Bishop house and I think you can have it, but I tell you now it will cost you more than the Cooke house. And I said I do not consider I am liable to any rent until the general order is put into effect applicable to all. He said, I am only talking about the scale of prices. There will be a greater rental for the Bishop house than for the Cooke house, and I said, very well, will you kindly write me a letter and let me know what is to be the difference under that scale of rental that you gentlemen are working on as between the two houses, and I said, when
125 will that general order go into effect, and he said I think by November 1st, but certainly not later than January 1st, and I said, that is just about the time I will move into the Bishop house. And I said, Captain, when you make up your scale, drop me a line and let me know what will be the difference in the scale applicable to the two houses, and I will let you know whether I will stay where I am or take the other house. You will see that he refers to it. I recollect that letter of September 25th. (Afterwards introduced in evidence as Respondent's Ex. No. 10.) It does not refer to other people paying rent. He said that he would advise me in advance when the scale was to be put into effect under the Executive Order, so that I could determine as to the houses. And I contemplated entering into a rental arrangement in view of a contemplated general order, and that is borne out by the fact that there was an anticipatory notice to me which is borne out by a general circular sent out by the Chief Quartermaster to every man, woman, or child that had apartments or houses. (Witness reads circular,

afterwards introduced in evidence as Relator's Exhibit "J"..)

That order was afterwards generally enforced. Instead of $55.00 they were to charge me, it was $50.00, and they never charged me but $50.00. By the time they had promulgated it they had changed it from $55.00 to $50.00. Under this order everybody paid rent for the period of three months. Then it was suspended, with the exception of the District Judge, the District Attorney, and the Marshal. They required me to pay rent from the first day that I took House 118, Ancon, that is from May 1, 1914, up to the present time, but all other officials and employees, except the Judge, the District Attorney and the Marshal are excepted. The Executive Order was suspended on May 25, 1915, and then everybody ceased paying rent, but they still insisted on collecting from the Judge, the District Attorney and the Marshal. During the period that rent was required it was paid by all of the civilian and military officials and employees of The Panama Canal.

After I had this conversation with Capt. Wood, Mr. Jackson, the former District Attorney, and myself submitted and filed written arguments against the decision of the Comptroller.

I wrote the letter to the Governor dated December 12, 1914. (Letter afterwards introduced in evidence as Respondent's Ex. No. 16.)

I did not object to paying rent when it was paid by others. My agreement to pay rent was not subsequent to the decision of the Comptroller of the Treasury that the Judge, District Attorney, and Marshal would have to pay rent regardless of whether others paid it or not. In my letter of December 12, 1914, addressed to the Governor, I asked that payment of the rent charged against me for House 118, Ancon, be suspended, pending the final decision of the Auditor on the question, and the Governor then saw fit to refer it to the Auditor. I was anxious to have him recommend it and not to give an erroneous decision when I saw the Government was intent upon following it. I thought the Comptroller of the Treasury had no jurisdiction in the matter whatsoever. I did not

think it would be binding on me as the Judge and distinct from the other employees of The Panama Canal. I would like to see that changed.

I am familiar with the several decisions of the Comptrollers rendered upon the subject of rent, and with the decision of the Comptroller with regard to a refund to me of money which had been deducted from my pay. (These several decisions afterwards introduced in evidence by Respondent.)

I am also familiar with the opinion of the Attorney General of the United States on the same subject. The Attorney General decided one thing and the Comptroller decided another. I never requested the decision of the Comptroller upon the question of the refund. This question was not submitted with my consent. It was submitted over my protest. Mr. McIlvaine, the Executive Secretary, wrote me a letter, advising me that the Attorney General had decided that the $170.00 should not have been held by the Auditor, that he had no authority so to do. In that letter he asked me if I wished to have the return of my money, and if so, please advise. And I wrote back and asked him to kindly return the money. Instead of doing that, and after my making several requests upon Mr. Smith to return my money, I got back a letter from Mr. Smith saying that he and the Paymaster had decided that there is a question about the matter, notwithstanding the opinion of the Attorney General, and you will find a very vigorous protest that I made to the Paymaster against that decision.

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I remember the opinion of the Comptroller of March 25, 1916, and upon its rendition and upon being advised by the Acting Governor of his intended action, instead of acting upon the opinion of the Attorney General holding exactly opposite to the decision of the Comptroller, I took this action. (The Court here called for the reading of the letters and opinions of the Attorney General of December 21, 1915 and correspondence leading up to them relative to the liability of the District Attorney and the Marshal of the Canal Zone for rent and light charges,

which correspondence and decisions were afterwards introduced in evidence by Respondent.)

In view of the construction which I have put upon the Adamson Act and the fact that others are not paying rent, I do not think that I am liable for this rent. I do not deny that I have occupied the houses nor that I have received the electirc current, nor do I say that the rent and electric current are not worth the amounts which I have been charged. I claim that there is no legal liability on my part to pay them. I occupied the houses and had the benefit of the electric light, but as a matter of law I claim I do not owe for them.

Re-direct.

During the period in which I acted as Associate Justice of the Supreme Court in company with Judge Gudger and Judge Brown, from March or April, to June 30, 1914, no rent charges were made against Judges Gudger and Brown for the occupancy of their residences. They did not hold any office under the Act of August 24, 1912, and neither one of them held the office which I now hold under the Act of August 24, 1912. (Witness reads a letter from Judge Feuille to Governor Goethals, afterwards introduced in evidence as Relator's Exhibit "K".)

H. A. A. SMITH, the respondent, after being
127 first duly sworn testified as follows:

Direct Examination.

"I am the Auditor of The Panama Canal with the Accounting Department. I was appointed by the Governor of The Panama Canal on April 1, 1914. From May 1911 until April, 1914 I was Examiner of Accounts under the Isthmian Canal Commission. As auditor of The Panama Canal I took over the duties of the Examiner of Accounts and some additional work—supervision of cost-keeping, etc. The Panama Canal was placed by the President of the United States under the supervision of the Secretary of War.

"In the matter of auditing of accounts relating to money appropriated by Congress for The Panama Canal, I am governed by the decisions of the Auditor for the War Department and the Comptroller of the Treasury. I am not the final or independent auditor with regard to any of the appropriations of money by Congress for The Panama Canal, either in the matter of the construction or operation of the Canal, or the payment of salaries of anyone here. I have not undertaken or assumed to audit or decide any of the questions relative to the payment of rent by Judge Jackson, or with questions with regard to his accounts or deductions from his salary. These questions have been decided entirely by the Comptroller of the Treasury, as far as they related to The Panama Canal. In matters of that kind, where a claim is disputed or where the right of anybody to a payment is questioned, in the first instance, we determine whether there is any doubt to make the payment. Where there is no doubt, the vouchers are passed on for payment. If there is a doubt, the question of law is referred to the Comptroller of the Treasury. Under the Dockery Act, the Governor is given the authority to refer questions of that kind for his decision, which are final upon the Auditor making the request. I have general supervision over the paymaster of The Panama Canal and his office. His is one of the three divisions of the Accounting Department. If the paymaster declined to make a payment I cannot force him to do so. If I approve a payment he is not obliged to make it. In the audit of the accounts of the Panama Canal, including the payment of salaries of the payrolls, which cover practically all employees of The Panama Canal, in fact everyone paid out of Panama Canal funds, with a few exceptions are prepared by the Timekeeping office, which is under the jurisdiction of the Executive Secretary of the Panama Canal—not under my jurisdiction at all. Those payrolls come into the office and are checked in detail. The payrolls are compared with what we call 'pay receipts' or 'pay certificates' or 'pay checks', which pay checks are checked in detail and verified. When we are satisfied the payment is a correct

one it is then passed along to the paymaster, who verifies the pay receipt with the payroll and then sends them forward for payment. He sends them over to the Timekeeping Division or to the Auditor. It is not a duty of my office as auditor to prepare these pay receipts for officials of the Canal and of the Judiciary Department. My office checks them after their preparation. They are prepared in the timekeeping office. My office determines whether they are correct, whether there are any claims against them by the United States, and if there is any question about them they are held up in the office, and the question is referred to the Comptroller of the Treasury for his opinion. These pay receipts are not delivered to the owners by my office. They are delivered by the paymaster.

"When a pay certificate for the salary of an officer of the Canal Zone or of the Judiciary comes into my office made out by the Timekeeping Department, this pay certificate is examined in my office for the purpose of seeing that everything is correct, and if so it is certified and passed on to the paymaster for delivery. The function of my office is to see whether it conforms with the law in the first instance. There is an additional function that should be referred to, that after the pay receipts are passed it is the duty of the office to check the payrolls against the original time records, to see that everything is absolutely correct.

128 "The origin of the question of rent to be charged employees generally and the Judiciary Department, came up in connection with the provisions of the Panama Canal Act, with regard to the limitation upon the concessions of employees, and then in connection with appropriations made for the construction on the Isthmus. The President issued an Executive Order setting forth the conditions of employment of all employees on the Panama Canal, in accordance with the Panama Canal Act, which provided for a charge for rental at such time as the President might see fit. Subsequently, he issued an Executive Order, which went into effect March 1, 1915, providing for the charge of rental to employees

of the Panama Canal, and purporting to be in accordance with the original Executive Order setting forth the conditions of employment of employees of The Panama Canal. On May 25, 1915, that order was suspended until July 1, 1916, when it will go into effect again, unless some action is taken in the meantime. This applies to all employees generally of the Panama Canal and the Panama Railroad. The Panama Canal act was effective April 1, 1914, but it was not until later that the conditions of employment were passed upon, altho it was not until later that the provisions relative to rent charges were made effective. It was my understanding that the question of rent charges grew out of the provisions of the Panama Canal Act, and also the appropriations which were made for the construction of buildings for residences.

"On April 1, 1914, or just prior thereto, when the order came out which put into effect the provisions of the Panama Canal Act, several questions came up in regard to the rights of the Supreme Court Justices and the Circuit Court Justices, who were the same individuals. The questions came up as to the rights of the District Judge, in view of the fact that he was acting in a dual capacity in regard to various matters of leave, commutation of leave, annual leave and accumulative leave, under the new order. There was no agreement of opinion in my office as to what their rights were, and there appeared to be no agreement between the Judges, that is, as to just what their position was. The Panama Canal Act provided that the District Judge, District Attorney, and Marshal, should receive no emoluments other than their salaries or compensation—I mean the Act of August 24, 1912. In that Act, the limitation, as it has been decided at any rate, was placed as to the amount of vacation leave to be allowed the District Judge. The statement in there is that the District Judge should be allowed six weeks' leave of absence with pay each year—it didn't apply to the District Attorney and it didn't apply to the Marshal. The present District Judge came to my office at Empire, I think it was just prior, or rather between the time of his notice of appointment and entrance upon duty, and some

discussion was made as to this rights under that law, and how it would be considered by The Panama Canal accounting officials. When I was in his office in Ancon some time subsequently, I think some time after he became District Judge, we went over the situation again. I expressed absolutely no opinion on the subject. He was asking for the same leave privileges that were granted to employees of the Panama Canal, and under the same conditions, i. e., twenty-four days annual leave, thirty days accumulative leave, and seven days travel leave, and in addition he wanted six weeks additional leave granted him by the Attorney-General. That is the impression I got from the conversation. The question of payment of accumulative leave came up under the old organization, effective, I believe, in the fall of 1910. The conditions of employment were modified so as to provide upon termination of service, any leave earned up to a certain amount, should be paid in a lump sum in lieu of granting leave; in view of the fact that some would be leaving the service, and some of those that would be leaving would prefer to get their pay that way.

"The question was what the status of the Supreme Court Justices was. The three of them continued after the Panama Canal went into effect, and until such time as the President might determine; they all wanted (including Judge Jackson), their accumulative leave up until the time that they were separated from the service as Supreme Court Justices. The law stating that no emoluments should be paid other than salaries, it would seem, at least, that there was a doubt as to whether Judge Jackson was entitled to it after April 1, 1914. Also, the question was what the status of the other Judges
129 was, in view of the fact that they had been commissioned by the President—as to whether they were in fact really employees of the Isthmian Canal Commission and governed by their regulations. I did not think that I was in a position to settle the question definitely, that it was beyond my settlement as to the rights of these officers, the District Judge, the District Attorney, the Marshal, and the Supreme Court Justices. The

money appropriated for these offices was in an appropriation which had been consolidated with the funds appropriated for the Isthmian Canal Commission, and this money was available for the payment of the expenses of the new organization.

"We followed our usual course in the matter, and a letter was prepared for the Governor's signature, addressed to the Comptroller of the Treasury, asking for his decision on as many questions as seemed to be raised under the law, for our guidance so that there would be no mistake. When a payment is made by the Paymaster and it is not allowed by the Auditor or the Comptroller upon appeal to him, it is a question of the Paymaster making payment. He must go down into his own pocket and make it good. In other words, if he makes a payment and it is disapproved, he must go down in his pocket for it, altho in the first instance the legality is passed upon by the Auditor's office. The questions were referred to the Comptroller of the Treasury, and he decided the various questions that were referred to him, with the result that it was stated that Judge Jackson, the District Attorney, and the Marshal, were not employees of The Panama Canal. An objection was made to the decision, and the question was again referred to the Comptroller, and again and again the question coming up in different phases, as to the right to make the payments. My office had nothing to do with the period of vacation allowed Judge Jackson. The only limitation that is placed on it is whether he is entitled to pay over the six weeks, and this question was referred to the Comptroller of the Treasury.

"I know about Judge Jackson's house, now occupied by him, in a general way. It is the same kind of a house I live in at the present time. There are about fourteen rooms in it. It is desirably located.

"I am familiar, in a general way, with rents charged in the Republic of Panama. The apartment house in Panama, opposite to Judge Jackson's house, is privately owned, and they rent apartments of six rooms for $75.00 a month. The price of $50.00 a month charged Judge Jackson for his house is certainly reasonable, to say the

least. As to the house formerly occupied by him, in my opinion the rate of $25.00 per month is ridiculously cheap.

"I am familiar with the charges for electric current in the two houses occupied by him. The charge is based on the cost of the service as near as the cost can be determined. My office keeps the cost accounts for house 117. The rate charged for electric current for his present house is as near the cost as could be determined.

"The explanation of the withholding of the sum of $170.07 from Judge Jackson's salary for the month of December, 1914, is that $170.07, was the amount charged for rental and electric current for house 117, Ancon, from May 1, 1914, to the time that he vacated the house, October 17, 1904. In the ordinary course of procedure, all bills prepared by the Canal, except a few that are paid directly, come into the office and are registered and where it is a bill against the Canal and there is no indebtedness to the United States, a general rule requires that those bills shall be reported to the pay roll division, and put on what is called a 'Joker'. It is placed upon the card of the employees being paid, so that the matter will be taken into consideration at the time. The bill is also sent to the Timekeeping office, and the Timekeeping office enters the amount of the bill on the roll and makes the deduction.

"In Judge Jackson's case, the amount of the bill was charged on the roll under the proper column, and a pay receipt for the amount of his salary—$500.00 less this $170.07—was issued and came into our office and was checked by the Paymaster, and delivered by him to Judge Jackson. The deduction was made from Judge
130 Jackson's salary, in compliance with the decision of the Comptroller of the Treasury. With regard to the deduction of $500.00 from salary of March, 1916, we had received various decisions of the Comptroller of the Treasury, and the matter had been put up finally to him after the Attorney-General had passed upon the liability of the District Attorney and the Marshal; and the question was again, under the direction of the Governor referred to the Comptroller for final decision from him as to whether there was any way at all to get out from under

the clause of the Adamson Bill. His decision was that the Paymaster was not authorized to make any further payments without setting off against this sum the amount that had been charged for rental, and accordingly, the pay receipt of Judge Jackson for $500.00, was held in my office, in compliance with the decision of the Comptroller. For the month of March, 1916, we deducted, or withheld rather, from Judge Jackson, the amount of the bills due up to that time, and this left a balance due upon the rent and electric light bills of $325.30. In addition to this sum there was also deducted the amount of $16.67, on account of his absence from the Isthmus on April 21, 1916. The amount of $16.67, had been taken from the pay receipt, i. e., a pay receipt had been issued for $500.00 less $16.67, in the Timekeeping Office, on account of the fact that a report sent to that office, so I am advised, showed that he was absent from the Isthmus on April 21, 1916.

"Judge Jackson was not treated as an employee in this matter. We have no connection whatever with the consideration of Judge Jackson as an employee. The law provides that the District Judge shall receive six weeks leave of absence with pay. The Judge has a right to make his claim for pay in various ways. It is true that the pay for the District Judge, the District Attorney, and the Marshal are included in the appropriations which are assigned to the Panama Canal for expenditures. The statement I made in the letter which I wrote to Judge Jackson was that if he wanted to be paid directly by us, he would have to report to the Timekeeping Office. I may not come short of the procedure required of me. If his accounts are wrong he may then go to the United States in order to get his money. In my office no question is raised about leave at all. We have been of the opinion, and are acting under the opinion, that where a man is granted a vacation, that there is no question whatever for The Panama Canal as to where they spend their time, whether they are on the Isthmus or off: their position and their office carries with it the right for compensation for the entire time that they are on their vacation. In the case of the District Judge, there is a limitation in the

Act that he shall receive six weeks leave of absence with pay, based apparently, on the old rules of the Isthmian Canal Commission that employees were allowed six weeks leave of absence. I believe it should not be in there, but it is there, and we could not pay in our office without a decision of the Comptroller or a certificate from Judge Jackson. If Judge Jackson or the Clerk signed it, he accepted the signature of the clerk as to his time, altho he had been advised that Judge Jackson could file his voucher direct. We could not accept and pay the voucher unless he certified that he had performed his duties as Judge for the month. The difficulty arises entirely from the provision for six weeks leave of absence. The question is entirely based on that, as to the right of The Panama Canal to pay him if he is away in excess of the six weeks. The absence of Judge Jackson from the Isthmus would not be of any concern whatever to my office, except for this six weeks provision. If he keeps within the six weeks it is entirely immaterial when or where he spends it. This was not my construction of the law, for I did not construe the law. We had to get authority to make payment of salary for any time in excess of the six weeks leave. It is up to Judge Jackson to present a voucher for the amount due him; he has a right to have his settlement made from Washington, but if he desires to have settlement made down here because we are closer to him, he must be governed by the rules that we are bound by. The Department of the Treasury in Washington could pay him, or undoubtedly the account could be transferred to the Department of Justice to pay him. If Judge Jackson wants to wait until he gets it from Washington he can get it from Washington as can also the District Attorney.

"Judge Jackson was also paid for the month of May, 1916, $500.00 less $55.06. That amount was made up of $53.06 and $2.00 for hospital bill, which he
131 paid sometime subsequent to the filing of the original petition for mandamus. There is another item in connection with the salary for January, 1916. He was paid $500.00 less $66.66, which was the amount of pay for December 9, 1915, to January 2, 1916, inclusive,

in excess of his six weeks leave. In that case it was under the Comptroller's decision that we could only pay up to six weeks leave. It was decided that this was a limitation placed upon The Panama Canal to make the payment. Those deductions covered March, April, and May. I have placed no construction upon the law at all; have simply asked for decisions that would govern us in paying the salaries, and we have enforced the construction placed upon the law by the Comptroller of the Treasury."

Cross Examination.

"I first came to the Isthmus in June, 1907. I came down with the Commission to examine accounts on the Isthmus. I came back in October as a clerk in the office of the Examiner of Accounts at Empire. At that time Mr. H. L. Stuntz was Examiner of Accounts. He was transferred to the Panama Railroad a couple of months later. Mr. Warwick, the present Comptroller of the Treasury became Examiner of Accounts in 1908. I remained in the Department of Examiner of Accounts until October 1, 1908. I then became Treasurer of the Canal Zone. Afterwards I was appointed Assistant Examiner of Accounts in the Washington office of the Isthmian Canal Commission. Major F. C. Boggs was the Chief of the Washington Office. The next position I held was Examiner of Accounts for the Isthmian Canal Commission. I was appointed by the Chairman of the Commission in May, 1911. I continued in that capacity until the reorganization on April 1, 1914, when I was appointed Auditor of The Panama Canal by the Governor of The Panama Canal. I am now Auditor of the Panama Canal. I am not the final Auditor at any time, with relation to money appropriated by Congress for The Panama Canal. I have never rendered opinions or acted in any manner which would indicate that I assumed the duties of a final Auditor. We don't refer every case that comes up. Over 40,000 cases come up, and we do not refer all of them to the Auditor or Comptroller of the Treasury, but in those I do not act as final Auditor, because all the accounts and vouchers

are forwarded to the Auditor of the War Department. They are examined there in the Auditor's office and passed upon, and he makes a final audit of the accounts, and if he has disapproved any of the accounts for payment, he disallows that in the accounts for the Paymaster. My duties are not purely ministerial when the accounts are returned to my Department from the Auditor of the War Department. We have the duty to determine in the first instance, if they are legal claims against the United States and whether they are correct, but it is not a final determination of the question. The party against whom we have made a decision has the right to appeal from my decision. He can go upon appeal to the Governor, and if he honors and approves the payment, may go to the Paymaster for payment; or he can go to the Auditor for the War Department; or he can go to the Court of Claims. In case he goes to the Auditor for the War Department and the Auditor for the War Department approves the payment, it does not come back here; it goes to the Secretary of the Treasury. When the Governor here approves for payment, it is passed on to the Paymaster of The Panama Canal for his action. The Paymaster of The Panama Canal is not bound to make the payment approved by either the Auditor of The Panama Canal or the Governor. He has the right, under the Dockery Act, to refer the question to the Comptroller of the Treasury for his decision as to whether he will be given credit in his accounts if he makes that payment. The Paymaster has the right to refer the matter to the Comptroller of the Treasury for his decision as to whether he had the legal authority to make the payment; as to whether he could get credit in his accounts. Under the regulations, all accounts are required to be approved by the Governor, and that approval is put on by the Auditor. If I had withheld from a person the payment of any sum, and thereafter, acting under the advice of the Comptroller of the Treasury, I would have the authority to re-imburse the party in the amount which had been previously withheld, without order from the Comptroller of the Treasury. We would

have the authority, if we were of the opinion that
132 it was a legal claim—we would undoubtedly have the authority to pass it along, subject to whatever legal result might arise. There was a case of a withholding of a sum of $110.00 from Judge Jackson's salary, which was withheld under orders of the Comptroller, and subsequently I passed it along to the Paymaster for payment. I had been withheld originally under orders of the Comptroller of the Treasury. There has been no change in the opinion of the Comptroller. I passed this voucher along to the Paymaster for payment. I did not order its payment.

"I cou d not have ordered, acting under the same authority, the payment of Judge Jackson in this instance, of every sum of money that had been withheld from his salary. What was done in regard to the $110.00 payment was because of the fact that the matter at that time was still a pending question; the Department believing that Judge Jackson would continue as District Judge long enough to enable The Panama Canal to collect its indebtedness, there was no difficulty in passing the voucher, but under the Comptroller's decision we were sure that the Paymaster was undoubtedly making himself subject to a suspension in his accounts, and a possible disallowance in that case. I cannot refer to the letter here, but my recollection is that there is an opinion of the Attorney-General or the Comptroller of the Treasury, along about the time that the $110.00 was returned to Judge Jackson. This question was pending as to whether Judge Jackson was under a legal liability for rent, and we were trying to give him every consideration possible, setting forth every argument that he made, every argument that the District Attorney made; we simply let the matter rest as to our duty under the law; as to whether he was receiving an emolument in excess of his compensation. We did this entirely out of courtesy for him, and in an attempt to have the matter adjusted in some way. We had no desire other than that Judge Jackson should have everything that he is entitled to, and every letter that he wrote, so far as I know, was sent right along. We tried to straighten

it out. He had the right to take it up if he wanted to, but he let the matter rest until the question was first raised, which was a few weeks afterwards, when it was decided that he was not entitled to any more pay until his indebtedness to the United States was paid, i. e., after it was decided that the District Judge, District Attorney, and Marshal must pay the rent. I considered my duties entirely ministerial, and Judge Jackson had the right to go to Washington to get his payment there if he wanted to. I wanted to pay everything to Judge Jackson that the law justified and no more, because we could not get credit in the accounts of the Paymaster.

"A request came up for the modification of the Adamson bill, and that request was forwarded to Washington, and we are still trying to get the law modified so that the District Judge, District Attorney, and Marshal will not have to pay rent. There is no reason why they should not be given the same consideration, but the law was as stated, and was put through Congress in that form. All we have tried to do was to enforce it in a reasonable way.

I don't remember any opinion rendered by me upon the legality of payments to be made to Judge Jackson on account of his absence beyond the time stipulated in the Panama Canal Act. It is possible that I expressed my own opinion. I do that very frequently upon questions that arise. That is one of my fundamental duties to express my opinion upon the legality of bills referred to the Governor for approval. He sometimes approves and sometimes disapproves. I wrote this letter and signed it, addressed to the Governor of The Panama Canal (Letter of Mr. Smith addressed to Colonel Goethals dated Empire, July 6, 1914, and afterwards introduced in evidence and marked exhibit "L"). I don't think that the Governor acted upon this opinion; as I remember it the Governor wrote to Judge Jackson quoting that letter, but he did not agree with me. My office did not make any deduction from Judge Jackson's salary on account of being absent beyond the forty-two days leave. The deduction was made by the Executive Secretary through his timekeeping bureau. It is barely possible that my office called it to his attention. I am not

sure as to that. I would have to see the original papers to see just the course of procedure that was followed.

"My office undoubtedly raised the question January, 1916, on account of Judge Jackson's absence in excess of six weeks; whether it was done specifically by my office or the Timekeeping Office I do not know; but
133 I know that we would have done it, and would not have permitted the total amount to pass if we had known that he was absent more than six weeks. Following the decision of the Comptroller of the Treasury, we would have exercised the authority to deduct from the salary of the Judge for any time in excess of the forty-two days that was called to our attention The Comptroller of the Treasury did not specifically advise or order me to withhold or deduct from Judge Jackson's pay the amount of the charges for rent and electric lights, which I considered due. He simply stated that credit would not be allowed in the Paymaster's accounts. In one case he decided that the amount deducted should not be refunded Attorneys-Generals' opinions have been rendered that there was no authority to deduct from his salary.

"The voucher was for refund of $170.07. That voucher was sent through to the Paymaster, but he did not believe he could get credit on the showing of that voucher, and it was sent forward to the Comptroller for his decision as to the right of the Paymaster to pay that specific amount, referring to the $170.07. The Comptroller held that the Paymaster was not authorized to make that disbursement.

"In regard to the decision of the Comptroller dated March 26, 1916, wherein Judge Jackson is charged with the sum of $940.73, on account of rent and electric light, and credited on account of payroll deductions of various payments amounting to $347.57, leaving a balance due of $593.16, I think that the amount of deductions was $347.-57, and this left a balance due of $593.16. I don't think that I was specifically authorized by the Comptroller to make the deduction of $347.57. The question of the amount of the balance due, to-wit: $593.16, was referred to the Comptroller and he held that Judge Jackson could

not be paid if he was indebted to the United States in that amount or in any other amount, for rent. The Comptroller decided that Judge Jackson was subject to the rental charge. He did not decide as to the specific amount that he should be charged for rent.

"With reference to the amount which might be paid by Judge Jackson for rent: The question was left to the Governor's discretion to fix the amount of the rent. I have the letter from Mr. Warwick to the Governor dated March 26, 1916. I presume it was referred to me by the Governor. I think at that time Colonel Morrow was Acting Governor. I took the question up with him, and with his agreement we followed that decision, i. e., for the time being the amount was withheld from his salary. The amount of the indebtedness was $593.16, and was based on the rental rates fixed by the Governor and the electric light rates fixed by him.

"The validity of the right to make the charge was determined by the Comptroller. The Governor approved the rental and approved the bills specifically, whether in writing or not I am not sure, but the rate of rental was fixed by the Governor. The charges were for the value of the services that were being given the Judge in excess of the compensation paid to him.

The rate of rental for quarters generally, and
134 in Judge Jackson's specific case, was determined by the Governor. On March 31, 1914, the Governor wrote a letter to the Chief Quartermaster, who has charge of all quarters on the Isthmus, telling him that the rental was going into effect the 1st of July, and instructing him to obtain information in regard to quarters and the expense of operation. That is to obtain general information from all District Quartermasters in regard to what rate of rental might be fixed. Following that, Capt. Wood, the Chief Quartermaster at that time, instructed all the District Quartermasters to report to him in regard to the quarters in their districts, and also in regard to the basis that they considered necessary to use in fixing the rentals. That memorandum of Capt. Wood of April 17th to the District Quartermasters also stated that the instructions

of March 31st had been recalled, but saying that they should go ahead and furnish the information, and that the rental would go into effect at some later date.

Judge Jackson's request for the rental of the Bishop house, asking for the advice as to the amount of rental, was addressed to Capt. Wood, and he wrote a long memorandum on the subject of rentals, stating in that that consideration should be given the general subject in connection with the fixing of the rental of Judge Jackson's specific house or houses. That memorandum went to Mr. Rousseau, who wrote an eight page memorandum discussing the various points that would come up, whether the original cost should be used as a basis, how much it should be reduced, whether electric light should be included, or whether we should charge for the use of water, whether consideration should be given to the location of the ground, expense of keeping up the ground, whether fuel should be included in the rental, also the collections of garbage, janitor service, and other items. That memorandum went to Col. Hodges. He expressed the opinion that it should be based somewhat upon salary paid. The memorandum went back to Capt. Wood. He went over the situation and recommended that a certain rental be fixed, and I think in the original memorandum of Capt. Wood he recommended that a certain rental be fixed for the Bishop house and also for House 117, and Mr. Rousseau also recommended a rental on these two houses; and upon the last recommendation of Capt. Wood the rental recommended was fixed and approved by the Governor, as made by Mr. Rousseau in his memorandum.

No further steps, except general ones, were taken to fix rent. No further action was taken on Judge Jackson's houses, neither one of them, neither the Bishop house nor the Cooke house, No. 117. Data was being gathered by my office, having charge of the Accounting Department, keeping detailed data of the cost of garbage, service, electric light, janitor service, etc., getting data on the original cost of the buildings, and also on the value of the buildings, which was being done largely by the Chief Quartermaster.

As I rember [remember], in February, 1915, it may be a little later than that, but it was not very much before the rental order effective March 1, 1915, went into effect, the board or committee on rental, Admiral Rousseau, Major Grove, and Mr. Wells, were charged with the duty of getting out a schedule of rents to take effect March 1st. That board had almost continual session for some time, considering all the data which was presented to them, and on that data they arrived at the basis of rental, taking into consideration the items that the President's Executive Order directed should be considered, namely, the expense of repairs, garbage collection, grounds, and certain other items. In other words, it was directed that the total rental should cover these current expenses, and the rental for employees generally was based on that Executive Order.

No attempt was made to fix the rental on the value of the buildings, but just for the expenses actually incurred, and in three months it was shown that it was somewhat less than the expenses incurred, and in fixing Judge Jackson's house at $50.00 it was reduced from the $55.00, which was originally fixed.

The Governor fixed the District Attorney's
135 and the Marshal's house at the same rate of rental which was to be charged Panama Canal employees generally, which was slightly under the rate we had been charging. The original circular fixing the rental charges provided that a surcharge of 80% would be added for the rental of buildings to other than employees, that is to officers of other departments of the Government, and also to contractors and outsiders. This surcharge, however, would not apply in the case of these three judicial officers.

The rental value of Judge Jackson's house was fixed by a committee appointed by the Governor, pursuant to the Executive Order of the President under the authority of the Panama Canal Act, and the rate fixed by the committee was approved by the Governor. It was finally fixed at the rates recommended by the committee, but it was not fixed originally by that committee. The final rates that were charged were the same which had been fixed

for those buildings for employees of The Panama Canal. No surcharge of 80% was made against Judge Jackson in the final collection. When the matter was first referred to the Attorney General the bills carried the surcharge of 80%. After they came back the Governor reduced those to the regular rates charged to Panama Canal employees and at the same time fixed the same rate to Judge Jackson.

The question of the legality of rent charge was referred to the Comptroller, but the Comptroller has never attempted to pass upon the question of the amount.

The specific question of the deduction of $66.66, withheld from the salary of Judge Jackson for the month of January, 1916, was not referred to the Comptroller. He had already rendered the decision that the District Judge was not entitled to pay for more than six weeks' leave of absence. In making the deduction I simply took the pay for the number of days that he was absent in excess of six weeks. There was also the deduction of one day's pay for absence on the 22nd day of April.

My department became cognizant of Judge Jackson's absence through the fact that the timekeeping voucher coming through the timekeeping department carried one day's absence. The time books of the various employees of the Canal and Judiciary Department are sent in directly to the Executive Secretary's Office. The ordinary method of handling the time of the twenty-five thousand or more employees is to carry them in time books. As a convenient means in keeping that time and handling their accounts they are all taken up on rolls and those time books are certified to by some one, designated for the purpose. In the case of the time books for the Court here, I understand that the Clerk carries on his timebook the name of the District Judge. If the Clerk should drop the name of the District Judge from the time book, undoubtedly the District Judge would apply some other way for his pay. But unless the time of the District Judge was reported to my department in some way, the payment of his salary would not be approved by my department. We would not prepare any voucher for payment, unless he prepared

something asking for payment, either himself or through some officer of his Court.

I did not mean by my letter to Judge Jackson that he should report daily to the time office, but that he had to get his name on the roll or apply in some other way for his salary in order to get it.

136 In my department there is no species of detective force. We have a timekeeping force who are not detectives in any sense of the word, but they are charged with the duty to look after the keeping of time and the misuse of material. It is one of the most valuable adjuncts of the Canal in keeping down the disbursements. We could not get along without some such service. It is absolutely essential.

I had a conversation with Judge Jackson the first time he came into my office at Empire upon the subject of the privileges to which the Judge was entitled under the Panama Canal Act, and the rules and regulations were discussed. I do not remember the date exactly. It was some time after his appointment, some time between the time when his name went to the Senate and the time it was confirmed. He was at Empire holding Court and we discussed the matter only briefly then. He was still acting as Supreme Court Justice. I do not know that anyone else was present.

This letter handed to me, dated June 1, 1914, addressed by the Governor of The Panama Canal to the Comptroller of the Treasury, was sent to the Comptroller under my advice. The letter was prepared in my office. (Letter read and afterwards introduced in evidence as Relator's Exhibit "I").

With regard to the sum of $500.00 monthly salary of Judge Jackson for the month of February, 1916, I authorized the withholding of a pay receipt, that is the retention of the pay receipt in my office for the decision of the Comptroller. The monthly salary of $500.00 for the month of February was afterwards paid to Judge Jackson, as I remember it upon the orders of Col. Harding, Acting Governor.

I took the question up with the then Acting Governor, Col. Morrow, after the decision of the Comptroller; was received. I am not sure whether the opinion of the Attorney General had come in at that time or not, but the payment was authorized at that time. It was approved as the proper course to pursue. Col. Harding came back after that and he took up the question with Judge Jackson, who came to his office. As the result of a telephone conversation with Judge Jackson he consented to the payment of that salary, and at the same time told Judge Jackson that he was going to refer this specific question to the Comptroller. I was in the office at the time he had the conversation, in which the Acting Governor told Judge Jackson that he would refer the matter to the Comptroller, and also told him that he would follow the decision of the Comptroller, whatever it was.

My supervision of the pay rolls and pay receipts on which the Paymaster makes payment is as follows: The time of all employees is carried on the pay rolls, and attached to those pay rolls are what we call pay receipts, one for each man. They are prepared in the timekeeping office, and these pay rolls come into my office, prepared with the name of the man, the amount, the metal check number, and the month, the rolls to which they belong, etc., and they are checked in my office against what is called the personnel record; then the rolls and also the receipts are verified as to the amount, which is determined from the time books. These three papers which you hand to me are orders or a notice from the Chief Timekeeper's Office.

(Witness reads three papers, afterwards introduced in evidence as Relator's Exhibits "M", "N", and "O".)

WILLIAM H. JACKSON, testified on Rebuttal:

In regard to the testimony of Mr. Smith with relation to a conversation which he says I had with him about the various questions which have been raised in this case I can only say that the statement is absolutely
137 false. I never had a conversation with Mr. Smith on this subject in his office or anywhere else at any time. I have written letters protesting against his action, and was never in Mr. Smith's office in Empire but once in my life, and that was for the purpose of a conversation with Mr. Warwick. I can only say that this statement of Mr. Smith is a fabrication, unless that he had in view some conversation that he had with Judge Gudger. Judge Gudger and Mr. Smith were having conversations. I never had any conversation with that man in my life, and was never in his office but the one time I went to have a personal conversation with Mr. Warwick.

The following written evidence, letters and copies of letters, the authenticity of which is admitted, were offered in evidence by the Relator and admitted without objection, and are hereto attached in chronological order:

1. Copy of letter dated Culebra, June 1, 1914, addressed to the Comptroller of the Treasury, Washington, D. C., and signed by Geo. W. Goethals, Governor, Panama Canal.

2. Copy of letter dated Empire, July 6, 1914, addressed to Colonel Geo. W. Goethals, Governor, Panama Canal, Culebra, and signed by H. A. A. Smith, Auditor, Panama Canal.

3. Copy of letter dated Ancon, C. Z., August 26, 1914, addressed to Colonel George W. Goethals, Governor, The Panama Canal, Culebra, and signed by Frank Feuille, Special Attorney.

4. Letter dated Washington, D. C., September 17, 1914, addressed to Hon. William H. Jackson, District Judge, Canal Zone, Ancon, C. Z., and signed by George E. Downey, Comptroller.

5. Copy of letter dated Ancon, March 18, 1915, addressed to Mr. H. A. A. Smith, Auditor, Panama Canal, Balboa Heights, C. Z., and signed by W. H. Jackson, District Judge.

6. Copy of letter dated Ancon, April 23, 1915, addressed to Mr. H. A. A. Smith, Auditor, Panama Canal, Balboa Heights, C. Z., and signed by W. H. Jackson, District Judge.

7. Copy of letter of April 24, 1915, addressed to Hon. Wm. H. Jackson, District Judge Ancon, and signed by H. A. A. Smith, Auditor, Panama Canal.

8. Letter dated Washington, D. C., August 16, 1915, addressed to Hon. Wm. H. Jackson, District Judge of the Canal Zone, Ancon, Canal Zone, and signed by Samuel J. Graham, Assistant Attorney General.

9. Copy of letter dated Balboa Heights, November 11, 1915, addressed to Hon. Wm. H. Jackson, District Judge, Ancon, C. Z., and signed by H. A. A. Smith, Auditor, Panama Canal.

10. Copy of letter dated Ancon, January 18,
138 1915, addressed to Mr. C. P. Fairman, Attorney at Law, Cristobal, C. Z., and signed Wm. H. Jackson, District Judge.

11. Letter dated Washington, D. C., January 28, 1916, addressed to Hon. William H. Jackson, United States District Judge, Ancon, Canal Zone, and signed by Samuel J. Graham, Assistant Attorney General.

12. Letter dated Washington, D. C., February 1, 1916, addressed to Hon. Wm. H. Jackson, United States District Judge, Ancon, Canal Zone, and signed by Samuel J. Graham, Assistant Attorney General.

13. Copy of letter dated Washington, D. C., March 28, 1916, addressed to The Governor of The Panama Canal, Balboa Heights, and signed by Earl I. Brown, Major Corps of Engineers, U. S. A., Chief of Office.

14. Copy of letter dated Balboa Heights, April 18, 1916, addressed to The Honorable Newton D. Baker, Secretary of War, Washington, D. C., and signed by Geo. W. Goethals, Governor, The Panama Canal.

15. Three pink slips, addressed to the Chief Timekeeper of The Panama Canal, relating to pay receipt of Wm. H. Jackson.

16. Copy of circular, without date, signed by District Quartermaster of The Panama Canal, relating to charge for rental of married quarters.

And the following written evidence and copies of decisions of the Comptrollers and of the Attorney General of the United States, and copies of letters, the authenticity of which is admitted, were introduced in evidence by Respondent and admitted without objection, and are hereto attached in chronological order:

1. Copy of letter dated Ancon, C. Z., May 26, 1914, addressed to Col. George W. Goethals, Governor, Panama Canal, Culebra, and signed by Wm. H. Jackson, District Judge.

2. Copy of letter dated Ancon, June 5, 1914, addressed to Mr. H. A. A. Smith, Auditor, Panama Canal, Empire, and signed by Wm. H. Jackson, District Judge.

3. Copy of decision of Comptroller of the Treasury, George E. Downey, dated Washington, D. C., June 23, 1914.

4. Copy of letter dated Ancon, June 27, 1914, addressed to Col. Geo. W. Goethals, Governor, Culebra, C. Z., and signed by Wm. H. Jackson, District Judge.

5. Copy of letter dated Ancon, June 29, 1914, addressed to Col. Geo. W. Goethals, Governor, Culebra, C. Z., and signed by Wm. H. Jackson, District Judge.

6. Copy of letter dated Ancon, July 11, 1914,
139 addressed to Col. Geo. W. Goethals, Governor Culebra, C. Z., and signed by Wm. H. Jackson, District Judge.

7. Copy of memorandum for the Governor, dated Culebra, August 10, 1914, signed by R. E. Wood, Chief Quartermaster, with memorandum underneath fixing charges of rental for houses occupied by Judge Jackson, Signed G. (Goethals)..

8. Copy of memorandum for the Governor, dated Balboa Heights, September 11, 1914, signed by R. E. Wood, Chief Quartermaster.

9. Copy of letter dated Balboa Heights, September 24, 1914, addressed to Hon. Wm. H. Jackson, District Judge, Ancon, Canal Zone, and signed by R. E. Wood, Chief Quartermaster.

10. Copy of letter dated Ancon, C. Z., Sept. 25, 1914, addressed to Capt. R. E. Wood, Chief Quartermaster, Balboa Heights, C. Z., and signed by Wm. H. Jackson, District Judge.

11. Copy of letter dated Balboa Heights, September 28, 1914, addressed to Mr. R. R. Watson, District Quartermaster, Ancon, C. Z., and signed by R. E. Wood, Chief Quartermaster.

12. Copy of letter dated Ancon, October 1, 1914, addressed to Capt. R. E. Wood, Chief Quartermaster, Balboa Heights, C. Z., and signed by Roy R. Watson, District Quartermaster.

13. Copy of Memorandum for the Governor, dated Balboa Heights, October 19, 1914, and signed by Wm. R. Grove, Chief Quartermaster.

14. Copy of a Memorandum for the Auditor, dated Balboa Heights, October 21, 1914, and signed by W. R. Grove, Chief Quartermaster.

15. Copy of a Memorandum for the Auditor, dated Ancon, December 1, 1914, and signed by Roy R. Watson, District Quartermaster.

16. Copy of letter dated Ancon, December 12, 1914, addressed to Col. George W. Goethals, Governor, Panama Canal, Balboa Heights, and signed by Wm. H. Jackson, District Judge.

17. Copy of a letter and decision of the Comptroller of the Treasury, dated Washington, D. C., December 28, 1914, addressed to Col. Geo. W. Goethals, Governor, Balboa Heights, C. Z., and signed by Geo. E. Downey, Comptroller.

18. Copy of letter and decision of the Comptroller of the Treasury, dated Washington, April 6, 1915, addressed to the Governor of The Panama Canal, and signed by Geo. E. Downey, Comptroller.

19. Copy of letter and decision of the Attorney General of the United States, dated Washington, July 8, 1915, addressed to The Honorable, The Secretary of War, and signed by T. W. Gregory, Attorney General.

20. Copy of letter and decision of the Comptroller, dated Washington, September 16, 1915, addressed to the Governor of The Panama Canal, Balboa Heights,
140 and signed by W. W. Warwick, Comptroller.

21. Copy of a letter dated Ancon, Canal Zone, Sept. 21, 1915, addressed to the Acting Governor, The Panama Canal, Balboa Heights, Canal Zone, and signed by Charles R. Williams, District Attorney, and William H. May, Marshal.

22. Copy of a letter dated Washington, December 21, 1915, addressed to Charles R. Williams, Esq., United States Attorney, Ancon, Canal Zone, and signed by T. W. Gregory, Attorney General.

23. Copy of a letter dated Ancon, January 8, 1916, addressed to Major General Geo. W. Goethals, Governor, Panama Canal, Balboa Heights, C. Z., and signed by Wm. H. Jackson, District Judge.

24. Copy of letter dated Balboa Heights, January 14, 1916, addressed to Honorable William H. Jackson, District Judge, Canal Zone, Ancon, C. Z., and signed by Geo. W. Goethals, Governor.

25. Copy of a letter dated Ancon, January 26, 1916, addressed to Colonel Jay J. Morrow, Acting Governor, Balboa Heights, C. S., and signed by Wm. H. Jackson, District Judge.

26. Letter dated Balboa Heights, February 8, 1916, addressed to Judge Wm. H. Jackson, Ancon, C. Z., and signed by Jay J. Morrow, Acting Governor.

27. Copy of a letter dated Balboa Heights, March 11, 1916, addressed to The Honorable, The Secretary of War, Washington, D. C., and signed by Chester Harding, Acting Governor.

28. Copy of letter and decision of the Comptroller, dated Washington, D. C., March 25, 1916, addressed to the Governor of The Panama Canal, and signed by W. W. Warwick, Comptroller.

29. Copy of cablegram dated Washington, D. C. March 28, 1916, addressed to Pancanal, Panama, and signed by Brown.

30. Copy of a letter dated Ancon, April 1, 1916, addressed to General George W. Goethals, Governor, Panama

Canal, Balboa Heights, and signed by Wm. H. Jackson, District Judge.

31. Copy of a letter dated Balboa Heights, April 13, 1916, addressed to Hon. William H. Jackson, District Judge, Ancon, C. Z., and signed by Geo. W. Goethals, Governor.

32. A statement of account of the United States of America nad The Panama Canal against Wm. H. Jackson U. S. District Judge, Ancon, Canal Zone, up to and including April 28, 1916.

33. Copy of a cablegram dated Balboa Heights, April 29, 1916, addressed to Pancanal, Washington, and signed Goethals.

141 Counsel for Relator and Counsel for Respondent announce that there was no more testimony to be offered.

II.

Counsel for Respondent made an oral motion to dismiss Relator's Petition for Mandamus on the ground that the admitted and uncontroverted facts showed that Relator was not entitled to a mandamus as against this Respondent; and because the Auditor of the Treasury Department of the United States, known as the Auditor for the War Department, is the legal auditor of The Panama Canal.

The Court stated that the motion would be considered as pending and would be ruled upon later.

Afterwards the Court over-ruled and declined to grant said motion, and Respondent excepted.

III.

After argument upon the case, the Court rendered judgment against the Respondent, granting the mandamus, and to which Judgment and decision Counsel for Respondent excepted.

IV.

And Respondent prays that this, his Bill of Exceptions, may be allowed, settled and sealed.

(Sgd.) CHARLES R. WILLIAMS,
Counsel for Respondent.

Settled and allowed this 18th day of July, 1916.

(Sgd.) H. D. CLAYTON,
United States District Judge, presiding.

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142 RELATOR'S WRITTEN EVIDENCE.

143 RELATOR'S EXHIBIT "I".

Copy

Culebra, June 1, 1914.

The Comptroller of the Treasury,
Washington, D. C.

Sir:

I have the honor to submit the following statement of facts and questions based thereon, involving payments to be made to judicial officers of the Canal Zone from appropriations for the support of the Panama Canal, for your decision.

Act No. 1 of the Isthmian Canal Commission adopted as "Laws of the Canal Zone" provides for a judicial system for the Canal Zone. Section 3 of that Act provides for the appointment of a Chief Justice and two Associate Justices. Section 4 reads as follows:

"(Salaries of the Members of the Supreme Court.)—The annual salary of each Associate Justice of the Supreme Court shall be six thousand dollars ($6,000.00), payable monthly. The annual salary of the Chief Justice shall be six thousand five hundred dollars ($6,500.00) payable monthly."

Section 12 reads as follows:

"(Leave of Absence).—All leaves of absence of the Justices of the Supreme Court shall be granted by the Governor of the Canal Zone. Leaves of absence of clerks and other subordinates, officials or employees of the Supreme Court shall be granted by the Chief Justice, and of the Circuit Courts by the presiding judge, pursuant to law."

Section 13 provides for the traveling expenses of the Justices and further provides that—

"During his term of office he shall be furnished a dwelling house or apartment, or in lieu thereof a sum of money equal to eight per cent (8 per cent) of his annual salary, at the option of the Commission."

It will be noted that while Section 12 provides how leave of absence may be granted, it does not specify the amount of leave to which these judicial officers are entitled. Under regulations in force prior to April 1, 1914, employees of the Isthmian Canal Commission were entitled to 42 days leave with pay during each service year and this privilege has been uniformly extended to Justices of the Supreme Court of the Canal Zone. In other words, the Justices of the Supreme Court have been treated in all respects as employees of the Isthmian Canal Commission, including leave privileges.

Section 9 of the Panama Canal Act of August 24, 1912, among other things provides that—

"The President may continue the Supreme Court of the Canal Zone and retain the Judges thereof in office for such time as to him may seem necessary to determine finally any causes and proceedings which may be pending therein."

Section 13 of the President's Executive Order of March 12, 1914, provides:

"The Supreme Court of the Canal Zone and the judges thereof shall continue to act after this order takes effect until the cases and business pending therein have been fully determined and disposed of; but cases tried in any of the Circuit Courts prior to April 1, 1914, shall not be heard in the Supreme Court unless the appeal is prefected and the case docketed in the Supreme Court before May 1, 1914."

144 By resolution of the Isthmian Canal Commission (minutes of 162nd meeting, page 1807) adopted by letter ballot effective October 1, 1912, authority was given for payment of commutation of accrued leave due an employee at the date of the termination of his service. Circular No. 536 of the Isthmian Canal Commission dated March 30, 1914, provides that all contracts of employment with the Isthmian Canal Commission will terminate with the close of business on March 31, 1914, with the exception of those employees on sick or injury leave.

Employees of the Isthmian Canal Commission whose services were terminated pursuant to this circular have been or will be paid commutation of leave to include March 31, 1914.

The original Justices of the Supreme Court of the Canal Zone were appointed by the Isthmian Canal Commission in accordance with the laws of the Canal Zone before referred to. In appears, however, that all of the present Justices of the Supreme Court of the Canal Zone were appointed by Executive Order of the President. The Chief Justice, Mr. H. A. Gudger was appointed by Executive Order dated December 23, 1908; said Order reads as follows:

"Under authority vested in me by law, and until otherwise provided by law or ordered, H. A. Gudger is appointed Chief Justice of the Supreme Court of the Canal Zone, at a salary of six thousand five hundred dollars per annum."

The Associate Justices were appointed by similar Executive Orders of subsequent dates.

Section 2 of the Panama Canal Act provides:

"That all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of The Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide. The existing Courts established on the Canal Zone by Executive Order are recognized and confirmed to continue in operation until the Courts provided for in this Act shall be established."

Under date of May 13, 1914, the following Executive Order was issued;

"All acts and resolutions of the Isthmian Canal Commission passed since February 28, 1907, in so far as they effect changes in the "Laws of the Canal Zone" or other enactments of the Commission relative to the Government of the Canal Zone prior to March 4, 1905, in so far as they have not been specifically approved or modified, are hereby approved.

By order of the President,

LINDLEY M. GARRISON,
Secretary of War."

In view of the foregoing facts—

(1) Are Justices of the Supreme Court of the Canal Zone to be considered as employees of the Isthmian Canal Commission within the meaning of the leave regulations?

(2) If your answer to the foregoing question is "Yes", can the accrued leave be commuted and payment therefor be made to such Justices on the date of the termination of their services?

(3) If the accrued leave may be commuted, should such leave be computed to March 31, 1914, or to the actual date of the termination of their services?

(4) If your answer to question 2 is "No", can the period that these Justices may be retained in service be extended so as to cover any leave that may be due them at the time their work as justices of the Supreme Court of the Canal Zone has actually terminated?

In connection with the foregoing, attention is also invited to the fact that one of the Associate Justices of the Supreme Court of the Canal Zone was appointed District Judge of the Canal Zone pursuant to authority contained in Section 8 of the Panama Canal Act of August 24, 1912, and that he entered upon his duties as such on May 1, 1914. It has been held by the Attorney General of the United States that this Judge can continue to sit as a member of the Supreme Court of the Canal Zone until the completion of the business of that Court, though without compensation for such services. A copy of the Attorney General's opinion dated May 2, 1914, is enclosed herewith.

(5) In view of there additional facts, can any leave accrue in favor of this Judge as a member of the Supreme Court of the Canal Zone after the date of assuming his duties as District Judge of the Canal Zone, following his confirmation by the United States Senate as such?

Section 8 of the Panama Canal Act of August 24, 1912, provides for a District Judge, a District Attorney and a Marshal and prescribes the salary of each. Said Section further provides that:

"The district judge, the district attorney, and the marshal shall be appointed by the President, by and with the advice of the Senate, for terms of four years each, and until their successors are appointed and qualified, and during their terms of office shall reside with (within) the Canal Zone, and shall hold no other office nor serve on any official board or commission nor receive any emoluments except their salaries."

Said section also provides that:

"The District Judge shall be entitled to six weeks' leave of absence each year with pay."

but does not make any provision for leave of absence of the District Attorney or Marshal.

Under the President's Executive Order of February 2, 1914, prescribing the conditions of employment for employees of the Panama Canal provision is made for the granting of leave of absence to such employees in excess of the six weeks authorized by the Panama Canal Act for the District Judge.

(6) In view of the fact that specific provision is made by law fixing the salaries of the District Judge, District Attorney and Marshal, are these officials to be considered as employees of the Panama Canal and as such entitled to the leave, quarters and other privileges extended to employees of the Panama Canal by the President's Executive Order of February 2, 1914?

In connection with this submission, your attention is invited to the enclosed letters dated May 26, 1914, from the Chief Justice H. A. Gudger, and the District
146 Judge, Wm. H. Jackson, addressed to the Auditor of the Panama Canal. I also enclose a copy of circular No. 536 dated March 30th, 1914, referred to in the foregoing.

In view of the fact that it is expected that the duties of the Justices of the Supreme Court will be terminated on or before June 30, 1914, it is requested that your decision on the questions submitted be communicated to the Washington office of the Panama Canal in order that the substance thereof may be transmitted to the Isthmus by cable.

Respectfully,

.....

Governor, Panama Canal.

RELATOR'S EXHIBIT "L".

147 Copy.

The Panama Canal.
Canal Zone.
Empire, July 6, 1914.

Colonel Geo. W. Goethals,
Governor, Panama Canal,
Culebra.

Sir:

Referring to your memorandum of the 2nd instant transmitting for my comment the request of Hon. W. H. Jackson, for information concerning leave privileges to be allowed him as District Judge of the Canal Zone, your attention is invited to the reply of the Comptroller to the 6th question submitted to him which reads as follows:

"(6). The district attorney and marshal appointed by the President under the provisions of the Panama Canal Act of August 24, 1912, supra, are officers and are entitled to their pay so long as they hold their commissions or appointments. The act providing for their appointment fixes no limit on the period they may be absent from their duties with pay, as is done in the case of the District Judge (see section 8, act of August 24, 1912, supra). The district attorney ard marshal are not employees of the Panama Canal, but officers with salaries fixed by law (act of 1912) at $5000 per annum each. As the law of 1912 prohibits the judge, district attorney and marshal from receiving 'any emoluments except their salaries', they are not entitled to government quarters free of rent. This question is answered accordingly.

The reply of the Comptroller above quoted does not define the status of the District Judge except by inference, but there can be no doubt that the status of the District Judge is the same as that of the District Attorney and Marshal except that the amount of leave with pay to which the District Judge is entitled is prescribed by law. This law operates both as a grant and a limitation.

As the District Judge is not an employee of the Panama Canal, he is not entitled to 24 days annual leave in addition to the 42 days allowed by law. Whether he would be entitled to pay for any period during which he may be disabled from performing his duties as Judge, in addition to the 42 days leave with pay prescribed by law, is a question which might be submitted to the Comptroller if the occasion arises. My opinion is that under the law as it now stands, the District Judge is only entitled to pay for 42 days in each year when not performing the duties of his office.

The letter of Judge Jackson addressed to you under date of June 27, 1914, with enclosures, is returned herewith.

Respectfully,

(Sgd.) H. A. A. SMITH,
Auditor, Panama Canal.

EG/ate encls.

RELATOR'S EX. "K".

148 Copy.

Ancon, C. Z., August 26, 1914.

Colonel George W. Goethals,
Governor, The Panama Canal,
Culebra.

Sir:

I am returning herewith Judge Jackson's letter and accompanying papers, relative to the six weeks leave of absence granted to the District Judge by The Panama Canal Act, which came with your reference of the 25th instant for my comment:

The District Judge, under the ruling of the Comptroller of the Treasury, is not a part of The Panama Canal organization insofar as the service rules are concerned. The appointment of the District Judge was made through the Department of Justice. I take it that that means administratively the District Judge is under the jurisdiction of

that department. The designation of a Circuit or District Judge of the United States, to take the place of the District Judge of the Canal Zone, must be made by the President of the United States in conformity with The Panama Canal Act.

I am, therefore, of the opinion that the question submitted by Judge Jackson is entirely for the resolve of the President and the Department of Justice.

I would suggest that he be advised to submit his request to the President, through the Attorney General of the United States.

Respectfully,

(Sgd.) FRANK FEUILLE,
Special Attorney.

149 RELATOR'S EX. "F".

Copy.

The Treasury Department.
Washington.
September 17, 1914.

Hon. William H. Jackson,
District Judge, Canal Zone,
Ancon, C. Z.

Sir:

I have your letter of the 5th instant, requesting my decision with reference to your leave privileges, annual and otherwise, under the act of August 24, 1912 (37 Stat., 560, 565), and in reply I have to inform you that I am without authority of law to render you a decision as requested.

Section 8 in paragraph 6 of the act of July 31, 1894 (28 Stat., 208), prescribes to whom and under what circumstances the Comptroller shall render advance decisions. A reading of said law will indicate to you that your query does not involve any questions which I am authorized to decide upon your own request, and that you are not one of the persons to whom I may render an advance

decision. And the proprieties seem to forbid that I should express to you even an informal opinion on a question which may later be presented in another way for official decision.

Respectfully,

(Sgd.) GEO. E. DOWNEY,
Comptroller.

F. W.

150 RELATOR'S EX. "A".

Copy.

Ancon, March 18th, 1915.

Mr. H. A. A. Smith,
Auditor, Panama Canal,
Balboa Heights, C. Z.

Sir:

I am enclosing to you herewith bill received by me for current furnished by the Electrical Division in my house, 115 Ancon, for the months of December, 1914, and in January and February, 1915, amounting to $19.54, with the statement that I do not consider that I am liable for the payment of this bill inasmuch as the regulations for the payment of rent and lights were made effective from the first of March, 1915.

I have never considered and I do not consider that there is any law or reason calling for the payment of these charges by me prior to the first of March, 1915, when the Executive Order for the payment of rent and electric lights by other officials went into effect.

In this connection I call your attention to the fact that on Oct. 26th, 1914, I received a bill for $170.70 for electric lights and rent from May 1st to October 17, 1914, a copy of which I enclose you herewith. This amount, although not voluntarily paid by me and not recognized by me as a just obligation, was, nevertheless, deducted from my salary. To this action I protest and hereby respectfully request a refund to me of the amount so deducted.

In the first place I maintain that the accounting officer of the Panama Canal and the Comptroller of the Treasury have no legal right or authority to pass upon this question, and if they did, nevertheless, the accounting officer of the Panama Canal had no legal right or authority whatsoever to withhold this amount from my salary. It has been repeatedly held that a deduction cannot be made from the salary of a Federal judge for an amount due by him to the United States Government. This was held in the opinion of the Attorney General of the United States in his opinion rendered June 27th, 1913, published in Vol. 20, page 627. It was also held by the Courts of the United States in a case arising out of the attempt of the Government to withhold a certain portion of the salary due to Judge Goff of the United States Circuit Court of West Virginia, where it was held that notwithstanding Judge Goff's liability on the bond of his clerk, a part of his salary could not be withheld to meet this obligation.

I maintain that even if there was an obligation on my part for the payment of rent prior to March 1st (but as I have stated, I consider it illegal and unjust) the way to enforce such claim would be by proper legal proceedings on the part of the Government and not by the arbitrary withholding of the same by the Auditor of the Panama Canal.

In this connection I also call your attention to the following quotation, under the decisions of the United States Supreme Court passing upon the right of a judge to receive his salary in full.

"Such salary is an annual stipend, payable in sickness as well as in health, for duties much more onerous in some districts than in others, and regardless of the fact whether such duties are performed by the judge in person or by the judge of another district called in to take his place. It is a compensation which cannot be diminished during the continuance of the incumbent in office, and of which he cannot be deprived except by death, resignation or impeachment." Benedict vs. U. S. (1900) 176 U. S. 357.

Will you please, therefore, favor me with the return of the amount withheld, vis: $170.70, or at least advise me as to your attitude with regard thereto so that I may take such steps as I may deem proper to pro-
151 tect my rights.

Respectfully,

(Sgd.) W. H. JACKSON,
District Judge.

WHJ/T

152 RELATOR'S EX. "B".

Copy.

Ancon, April 23rd, 1915.

Mr. H. A. A. Smith,
Auditor, Panama Canal,
Balboa Heights, C. Z.

Sir:

I feel compelled to write you again to state that I am still without reply to my letter to you of March 18th, in which I ask for a return to me of the sum of $170.70, which was theretofore improperly withheld from my salary.

Moreover, the check received by me for my salary for the month of March was $390.00 instead of $500.00 as it should have been. This was doubtless arrived at by deducting the sum of $110.00 on account of a claim for rental charges against me from December 1st, 1914, to January 31st, 1915, in the sum of $110.00.

I hereby protest against the withholding by you of this amount from my salary and ask the return of this amount as well as the sum of $170.70, theretofore withheld. As I attempted to point out in my letter to you of March 18th, the Accounting Officer has no authority whatsoever in law to arbitrarily withhold a portion of the salary due a judicial officer of the United States Government on account of some alleged claim against him for rental charges due the Panama Canal Government. If there should be

any valid claim for rental charges it should be presented and proceeded with in the proper way, thru the Department of Justice in due legal course, and should not have been withheld arbitrarily by the Accounting Officer of the Panama Canal for the Panama Canal Government.

I am just in receipt of a copy of a letter from the Comptroller of the Treasury to the Governor in which the Comptroller states as follows:

"This office has held, however, that this judge, and the attorney and marshal, are not employees of the canal, nor part of the canal organization; but are statutory officers with a status as to compensation and allowance dependant upon statutory provision."

As this is undoubtedly so, it would seem clearly to show that the Auditor of the Panama Canal, in case of claims against one of these officers, should present the same to the proper legal sources of the Government for collection or such other action as might be taken. But he clearly has no right to treat the Judge as being a part of the canal organization for the purpose of deducting from his salary some alleged claim for rental due.

Will you kindly give me a reply to this letter and oblige,

Respectfully,

(Sgd.) W. H. JACKSON,
District Judge.

WHJ/t

153 RELATOR'S EX. "C".

Copy.

April 24, 1915.

Hon. Wm. H. Jackson,
District Judge.
Ancon.

Sir:

Replying to your letter of April 23, I have to advise that I have been unable to reply to your letter of March 28 as the matter was referred to the Governor and no reply

has been received from him. I understand, however, that he has referred the question to the Attorney General.

The deduction made from your March salary while this question was pending was through error. An additional pay receipt will be immediately issued to cover this item. No action will be taken in regard to the prior deduction until the matter is finally settled.

Respectfully,

(Sgd). H. A. A. SMITH,
Auditor, Panama Canal.

CO-Mr. Green.

Mr. Hudson:

No deductions from salaries on account of nonpayment of bills will be made unless notice to make deduction is O. K.'d by Mr. Faure, Mr. Greene or myself. In all cases where deductions are contemplated from officers or employees receiving $500 or over per month, my attention should be called to same before the matter is finally handled.

H. A. A. S.

154 RELATOR'S EX. "E".

Copy.

C. E. S.-R.

Department of Justice,
Washington, D. C.

CES August 16, 1915.
53 X 52-3

Hon. Wm. H. Jackson,
District Judge of the Canal Zone,
Ancon, Canal Zone.

Sir:

In view of the statements contained in your letter of the 5th instant, sixteen days' leave of absence, with pay, in addition to that you have already taken this calendar year, is hereby granted you.

In order to complete this file, kindly advise the Department the exact period of your absence under this authority, after you shall have returned to the Canal Zone.

Respectfully,
For the Attorney General,
(Sgd.) SAMUEL J. GRAHAM,
Assistant Attorney General.

155 RELATOR'S EX. "D"

Copy

Balboa Heights,
November 11, 1915.

Hon. Wm. H. Jackson,
District Judge,
Ancon, C. Z.

Sir:

I am in receipt of your letter of November 9 enclosing a copy of your letter to the Attorney General of August 5 and his reply thereto of August 16. You ask whether the exact period of your absence should be reported to the Chief Timekeeper or to the Attorney General direct.

Insofar as the making of a report to the Attorney General is concerned, this office has no jurisdiction whatever. It is, however, essential that the exact period of your absence should be reported to the Chief Timekeeper if you desire to have your salary paid by the Panama Canal. There is nothing in the law which limits the time or place of taking your authorized leave of absence of forty-two days each year. If the total absence from the Isthmus, including any leave you may take on the Isthmus (and I do not understand there has been any) does not exceed 42 days, no proceedings will be initiated by this department looking to a deduction from your salary.

The above gives my opinion of the duties of this department as fixed by the law governing the payment of your salary through appropriations assigned to the Panama Canal for expenditure.

Respectfully,
(Sgd) H. A. A. SMITH,
HAAS/GN Auditor, Panama Canal.

156 RELATOR'S EX. "H"

Copy

The Panama Canal.
District Court of the Canal Zone.
Ancon, January 18th, 1916.

Mr. C. P. Fairman,
Attorney at Law,
Cristobal, C. Z.

My dear Mr. Fairman:

Referring to my conversation with you in Cristobal on the 13th instant wherein you told me that in view of certain communications of attorney F. E Porter to the President and the Governor of the Panama Canal dated respectively November 22nd and December 28th, 1915, wherein complaint was made as to the absence of the District Judge from the Canal Zone, as you felt disposed to submit a report of the matter to certain shipping interests which you represent and requested a personal statement from me as to the matter:

I beg to say the matter of my leave privileges has been so often and so thoroly thrashed out in communicat ons with the Governor and Auditor of the Panama Canal, the Comptroller of the Treasury and the Attorney General that I did not feel disclosed to go into the matter more fully than to enclose you herewith copies of my files in the matter which I do. I am sending my entire original file and would thank you to return same as early as possible. From a careful perusal of all the correspondence relating to this matter from beginning to end I think you will find it both amusing and instructive, particularly as it has been held that whereas the Marshal and District Attorney are officials of the Government and are entitled to all the leave privileges they may desire without any deduction in salary therefor, that I am limited strictly to six weeks each year and that this likewise must include the time consumed in travel to and from the States, and that any absence in excess thereof causes me to suffer a corresponding loss of salary.

Also, that during my necessarily brief absences there is no one to carry on the work of the Court so that this work accumulates, whereas the Marshal and District Attorney each is favored with an assistant to do their work during their absence. You will also note that it has been held that my leave allowance cannot be accumulated and that if not taken within the service year it is forfeited; that I am not entitled to the accumulation of sick leave and other similar privileges which are granted to all employees of the Panama Canal including the clerks and employees in my own Court.

With reference however to the statement of attorney Porter that the judge has been absent four times since April 1st, 1914, I beg to state this is absolutely untrue as he well knows and as he admitted to me when I called his attention to it. My first absence since April 1st, 1914, was taken in October of that year after having written to the Governor of the Panama Canal and the Attorney General requesting the designation of a judge to serve during my absence, and having received from the Attorney General and Governor letters which you will find herewith. I call your attention especially to my letter to the Attorney General of August 29th, 1914 and his reply thereto of Sept. 22nd, 1914.

I will state that after the receipt of the Attorney General's letter of Sept. 22nd I called upon the Governor of the Panama Canal personally and told him of the inability to send another judge down here and requested his advice as to whether or not, under the circumstances, I should take my vacation or should forfeit it. You will bear in mind Mr. Fairman that I either had to take it then or forfeit it entirely under the ruling of the government officials. The Governor very kindly stated to me, that, being entitled to my vacation, he saw no reason why I should not take it, suggesting however that I leave my address here with the District Attorney so that I might be cabled to in case of necessity, which I did.

157

My second vacation was taken in July 1915, and this vacation was cut short and lasted but a little over three

weeks. It was cut short, I may state, largely by reason of the fact that a certain New York lawyer whose name I think is Elisha K. Camp, with offices in the Woolworth Building, representing a party here charged with embezzlement in Canada and who desired to secure the extradition of this party, pursued me from the time of my arrival in New York until my return, urging my return to the Canal Zone for the purpose of expediting the extradition of this embezzler. In fact this New York lawyer cabled the authorities of the Panama Canal and also frequently telegraphed to the Secretary of War and Attorney General about the matter and personally pursued me to such an extent as to make life a burden to me so that I cut short my vacation and returned, only to find that the embezzler had voluntarily returned to the States with the authorities without awaiting for the necessary extradition papers. All of which I tried in vain to explain to the New York attorney before returning so precipitously.

Thereafter having, even under the strict rulings of the authorities, sixteen days leave of absence remaining, I wrote the Auditor of the Panama Canal advising him of my intention to take this sixteen days and received his reply which you will find herewith. I also wrote the Attorney General to this effect on August 5th, 1915 and received his reply of date of August 15th, from which you will note the Attorney General stated specifically as follows:

"In view of the statements contained in your letter of the 5th instant, sixteen days' leave of absence, with pay in addition to that you have already taken this calendar year, is hereby granted you."

Of this fact I duly notified the Auditor of the Panama Canal and had made my arrangements to take a short vacation covering a period of not more than sixteen days in Costa Rica and Habana, leaving here December 15th.

On Saturday, December 11th, my wife received a cablegram from Cincinnati advising that her mother was seriously ill and not expected to live. We therefore hurriedly changed our plans and left Sunday, the 12th, for New Orleans, my wife going direct to Cincinnati where she remained at the bedside of her mother and I going

for a short time to Atlanta to visit my brother in that city. We returned here on the 3rd, having come back as quickly as we possibly could with due regard to the grave illness of my wife's mother and the sailing of the ships from New Orleans.

For these reasons a few days over the sixteen were taken by me. So you will see I have in effect, in the last two years, taken but the two short vacations of six weeks each, as allowed to me under the the strict rulings of authorities.

Of course you and I know, and every member of the bar knows that statements and accusations on the part of attorney Porter cannot be seriously considered. Attorney Porter, as we know, is practically irresponsible, for which reason charity for him would require that I would not go into it too deeply and I would consider a personal accusation from him unworthy of notice or answer except at your personal request, the high regard I have for you and the kindly interest you exhibited in the matter.

As you stated to me, the duties devolving upon
158 a single judge in the Canal Zone with the necessity of holding continous Court practically all the year in this very trying climate are sometimes very exacting and I would consider the suggestion that you made to me a very good one, viz: that the District Judge should be allowed the same leave of absence as is granted to the marshal and district attorney or to other judges in the States, and that a judge from the States should be designated to come down here for a longer period than six weeks because, as you stated, a judge coming here for six weeks only would hardly be able to familiarize himself with the peculiar laws, customs and conditions within that space of time.

Appreciating the kindly spirit in which you approached me in this matter and trusting the correspondence I am sending you will serve the purposes you have in view, I am,

Very Sincerely Yours,
(Sgd.) WM. H. JACKSON,
District Judge.

WHJ/t
CC-The Attorney General, Washington, D. C.
CC-The Governor, Panama Canal.
CC-The Auditor, Panama Canal.

159 RELATOR'S EX. "F".

Copy.

S. J. G.-L.

Department of Justice.
Washington, D. C.

53 X 52-4.

January 28, 1916.

Hon. William H. Jackson,
United States District Judge,
Ancon, Canal Zone.

Sir:

The Department is in receipt of a copy of your letter of January 18th, 1916, to Mr. C. P. Fairman, relative to leave of absence taken by you. The statement which you make of this matter is entirely satisfactory to the Department.

Respectfully,
For the Attorney General,
(Sgd.) SAMUEL J. GRAHAM,
Assistant Attorney General.

160 RELATOR'S EX. "G".

Copy

SJG-L

Department of Justice.
Washington, D. C.

53 x 53-1.

February 1, 1916.

Hon. Wm. H. Jackson,
United States District Judge,
Ancon, Canal Zone.

Sir:

The Department is in receipt of your letter of January 22nd and its contents have been noted. The matter with regard to the allowance of your claim for salary by the Auditor is one entirely between the Auditor and yourself and with which this Department has nothing to do.

Respectfully,
For the Attorney General,
(Sgd) SAMUEL J. GRAHAM,
Assistant Attorney General.

161 RELATOR'S EX. "P".

Copy.

Washington, D. C.
March 28, 1916.

The Governor of The Panama Canal,
Balboa Heights, Canal Zone,

Sir:

I beg to confirm the cable-gram sent you today, reading as follows:

"Referring to your letter of the 11th instant Comptroller of the Treasury decides 'In reply to the two specific questions submitted you are advised that if you are satisfied that Judge Jackson is indebted to the United States in the sum of $593.16 as stated or any other amount

payment of salary to the amount of the debt should not be made by the Paymaster of The Panama Canal but the claimant should be left to submit claim for unpaid salary to the Auditor for the War Department or take such other action as he may elect. The same rule should be applied every month in the case of all persons indebted to the United States.' "

I enclose herewith the original decision of the Comptroller of the Treasury, referred to in the above quoted message. In view of the nature of this decision, it would seem to be unnecessary at this time to present the matter to the Attorney General, and therefore no action will be taken in connection with the penultimate paragraph in your letter to the Secretary of War, dated the 11th instant unless further advice is received from you.

Very respectfully,

(Sgd.) EARL I. BROWN,
Major, Corps of Engineers, U. S. A.,
Chief of Office.

Incls. Original decision above named, duplicate of this letter.

Auditor:
(Sgd.) G.
Noted and returned.
(Sgd.) H. A. A. S.

162 RELATOR'S EX. "Q".

Copy

Balboa Heights, April 18, 1916.

The Honorable Newton D. Baker,
Secretary of War,
Washington, D. C.

Sir:

I forward herewith a petition for Writ of Mandamus to be served on the Auditor for the Panama Canal in behalf

of William H. Jackson, Judge of the District Court of the Canal Zone, with the accompanying letter from the attorneys in the case, requesting that the matter be called to the attention of the President of the United States, or other proper officer of the Government, with a view to having detailed for temporary duty to the Isthmus to hear the case, a circuit or district judge of the United States, to be designated in accordance with the provision of Section 8 of the Panama Canal Act.

This controversy originated from a construction of the provision of the Panama Canal Act to the effect that the District Judge, the District Attorney, and the Marshal, are not entitled to Government quarters and electric light service free of charge, inasmuch as the Panama Canal Act provides that these officials shall not "receive any emoluments except their salaries". This decision was made by the Comptroller of the Treasury, and as a consequence deductions were made monthly from the salaries of these officials covering rent and electric lights.

Subsequently, the question was raised whether the accounting officers of the Canal Zone were authorized to make deductions for these purposes from the salaries, and the Attorney General of the United States held that, while these officials were liable for the charges, no part of their salaries could be deducted or withheld if they decline to make payment, but that suits should be brought in the Courts to determine the matter judicially. Upon receipt of this opinion, no further deductions were made, and Judge Jackson applied for the refund of $170.00, the total amount that had been withheld previously for the purposes named. The right of the Disbursing Officer to make this refund was taken up with the Comptroller of the Treasury, who decided that the refund should not be made, and the Disbursing Officer thereupon declined to make the payment.

The District Attorney and the Marshal, together with the Judge, refused to make payment, the first two of these officials requesting that a friendly suit be instituted—though they stated that, if in the opinion of the Attorney General they should pay the charges, they were willing to

do so rather than have the matter brought to trial. In view of the opinion of the Attorney General, the District Attorney and the Marshal made payment of their indebtedness without further question. The Judge, however, failed to do so, and the accounting officers of the Canal took up the question with the Comptroller of the Treasury to ascertain the steps that should be taken to recover the amount. The Comptroller of the Treasury decided that deduction should be made from any sum due, or to become due, Judge Jackson, until the indebtedness, aggregating some five hundred dollars, was paid.

From the foregoing, it will be seen that the object of the Writ of Mandamus is to require the Auditor for the Panama Canal to deliver certain pay vouchers for the amounts specified. Even if the Writ were issued, the Disbursing Officer, in view of the decision of the Comptroller, would not be warranted in paying the vouchers, since the Comptroller's decision is binding on all Government officials. The Comptroller of the Treasury in his decision sets forth that Judge Jackson's recourse is by appeal to the Auditor for the War Department, and, failing to receive his pay by this method, to take action in the Court of Claims.

There seems no doubt that Judge Jackson is indebted to the Government for quarters and lights, and that the Writ of Mandamus, if issued, would not secure
163 to Judge Jackson the payment of the sum which he is claiming as due; and, under these circumstances I do not believe that the expense which would be incurred in sending a United States district or circuit judge here to act on the Writ, is warranted.

Respectfully,

(Sgd.) GEO. W. GOETHALS,
Governor, The Panama Canal.

Incls. Copy of Petition.
Copy Mac Intyre and Fairman's letter 4-11-16.

164 RELATOR'S EX. "M".

A 165-Rev. MR 44329

The Panama Canal Pay Roll No. 5204

Balboa Heights, Canal Zone.

To Chief Timekeeper Pay

Receipt No. 381-A

Payee, Wm. H. Jackson Metal Check 1592

The above described pay receipt has been suspended/ corrected by this department for the following reasons: Held by order of Auditor of P. R.

Communications regarding it should show the above reference.

.....

Auditor, Panama Canal.

RELATOR'S EX. "N".

A 165-Rev. MR 44329

The Panama Canal Pay Roll No. 3204

Balboa Heights, Canal Zone.

To Chief Timekeeper Pay

Receipt No. 341

Payee W. H. Jackson, Metal Check 1592

The above-described pay receipt has been suspended/ corrected by this department for the following reasons:

Held, per instructions of The Auditor of Panama Canal.

Communications regarding it should show the above reference.

.....

Auditor, Panama Canal

RELATOR'S EX. "O".

A 165-Rev. MR 44329

The Panama Canal Pay Roll No. 4204

Balboa Heights, Canal Zone.

To Chief Timekeeper Pay

Receipt No. 341.

Payee Wm. H. Jackson Metal Check 1592.

The above-described pay receipt has been suspended/ corrected by this department for the following reasons:

Held by order of Auditor on acc't. of Bills.

Communications regarding it should show the above reference.

.....

Auditor, Panama Cana'.

165 RELATOR'S EX. "J".

Copy.

PC 1695 MR 2001

The Panama Canal.

Charges for Rental of Married Quarters.

Sir:

An Executive Order of the President of the United States requires that a rental will be charged for all quarters occupied by employees of The Panama Canal and Panama Railroad, commencing March 1, 1915.

Under the provisions of that order an appraisal has been made, and it is found that the monthly rental of the quarters now occupied by you, No. ...., will be $..... This price does not include fuel or electric current. Fuel may be purchased from the commissary. Until a meter is installed the charge for electric current for your apartment will be $.....

You will be given the first opportunity to rent the apartment which you now occupy, and unless you notify this office in writing by February 25, 1915, it will be assumed that you desire to rent the apartment and collection will be made accordingly.

While the privilege of transfer within a district has been continued as heretofore, it is possible that the District Quartermaster may not be able to make all transfers as rapidly as might be desired. For that reason no promises of any kind as to transfers can be made at this time.

.....

District Quartermaster.

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166 RESPONDENT'S WRITTEN EVIDENCE.

167 RESPONDENT'S EXHIBIT 1.

Ancon, C. Z., May 26, 1914.
Capt. Wood,
Note and return.
(Sgd) G.

Col. George W. Goethals,
Governor, Panama Canal, Culebra.

Sir:

I have to acknowledge receipt of your favor of the 20th inst. with regard to the house assigned for the use of myself and family. I fully appreciate the difficulties resulting from the large amount of work which at present devolves upon the supply department, and I wish to assure you that I have no desire to appear captious or to give any unnecessary trouble whatsoever. However, you state in your letter that the house formerly occupied by Mr. Metcalfe is to be reserved, and I notice in the paper of this date that the same has been offered to the Joint Land Commission for office purposes, and I presume that it will, therefore, be assigned for family use after the termination of the work of the Joint Commission. I have also heard from private sources that before a great while it is probable that the Bishop house will be unoccupied. The use of one of these houses would be a source of much pleasure and gratification to my wife and daughter, and I am writing to say that I will very gladly remain where I am for the present if I could expect to have assigned for my use either the Metcalfe or the Bishop house at some time in the future, say by January next.

Trusting that when the opportunity arrives this application may meet with your favorable consideration, I am

Respectfully,

(SGD) WM. H. JACKSON,
District Judge.

Copy to Chief Quartermaster.

168 RESPONDENT'S EXHIBIT 2.

Copy

Ancon, June 5th, 1914.

Mr. H. A. A. Smith,
Auditor, Panama Canal,
Empire.

Sir:

Referring to our conversation with reference to the annual leave to which the District Judge shall be entitled under the Panama Canal Act and the regulations established by the Governor, I would call your attention to the language of the Panama Canal Act in Section 8 thereof, as follows:

"The District Judge shall be entitled to six weeks leave of absence each year with pay. During his absence or during any period of disability or disqualification from sickness or otherwise to discharge his duties, the same shall be temporarily performed by any Circuit or District Judge of the United States who may be designated by the President."

This law would seem to contemplate an annual leave of six weeks for purposes of recreation, and, in addition thereto, such further period as the District Judge may be disqualified, from sickness or otherwise, from discharging his duties. The law does not seem to contemplate any deduction of salary by reason of the sickness of the Judge, however long such period of sickness may be, and this would seem to be in accordance with the rights of other judges in the States except that in the States the annual

leave period of judges is not regulated by any positive law but is left to the discretion of the individual judge.

Pursuant to the regulations established by the Governor of the Panama Canal, an employee here is, in addition to his thirty days' cumulative leave, entitled to twenty-four days' annual leave which, if not used for purpose of illness, may be added to his thirty days' cumulative leave. I am therefore writing to ask if, in addition to the six weeks leave of absence as provided by Sec. 8, the District Judge will be entitled to the additional 24 days in the event that he has not used the same or any part thereof by reason of sickness during the year. It would seem to me that this would be just and reasonable and in accordance with the spirit of the Canal Act and the regulations established by the Governor.

I would be glad to be advised as to this at your convenience.

Respectfully,

(SGD) WM. H. JACKSON,
District Judge.

WHJ/t

169 Respondents Exhibit 3—Decision of Comptroller, dated June 23, 1914, omitted from the Printed Record, being heretofore copied as Exhibit "C" to the Answer, at page 20.

* * * * * * * * * *

RESPONDENTS EXHIBIT 3.

171 Panama Canal
Washington Office

June 25, 1914.

Official copy respectfully furnished the Governor of the Panama Canal, Culebra, Canal Zone, for his information and files.

F. C. BOGGS,
Major, Corps of Engineers, U. S. A. Chief of Office.

CC to following:
Judge Frank Feuille, Ancon
The Auditor, Empire
The Paymaster, (Through the Auditor), Empire
The Executive Secretary, Ancon
The District Attorney, Ancon.

172 RESPONDENT'S EXHIBIT 4.

Copy

Ancon, June 27th, 1914.

Col. Geo. W. Goethals,
Governor,
Culebra, C. Z.

Sir:

I am just in receipt of a copy of yours of the first instant to the Comptroller of the Treasury, Washington, together with copy of extract from a cable received by you on the 24th instant replying to your communication of the first instant.

The Comptroller of the Treasury, in replying to the sixth proposition submitted by you, states as follows:

"Sixth—As Canal Act prohibits Judge, District Attorney and Marshal from receiving any emoluments except their salaries, they are not entitled to Government quarters free of rent."

This does not seem to fully answer the question submitted by you as to whether or not the District Judge is to be considered as an employee of the Panama Canal, and as such, entitled to leave pursuant to the provisions of the President's Executive Order of February 2nd, 1914.

As I would like to be advised as to my status in this respect I am sending you herewith a copy of my letter of June 5th to Mr. H. A. A. Smith, Auditor, and I would like to be advised whether the view expressed in my letter will be considered as correct; that is, will I be allowed my leave, account of sickness in addition to the six weeks leave of absence without any reduction of salary for such

sick leave; and, can such sick leave be taken outside of the Canal Zone; and also, if no sick leave has been taken during the year's period, will I be permitted to enjoy the twenty-four days annual leave in addition to the six weeks leave allowed by law?

Respectfully,

(SGD) WM. H. JACKSON,
WHJ/t District Judge.

Auditor:

Comment after receiving the Comptroller's letter which it is assumed is on the way.

(SGD) G.

173 RESPONDENT'S EXHIBIT 5.

Copy

Ancon, June 29th, 1914.

Col. Geo. W. Goethals,
Governor:
Culebra, C. Z.

Sir:

Referring again to the opinion of the Comptroller of the Treasury to the effect that the Judge, district Attorney and marshal are not entitled to Government quarters free of rent. While it must be seriously doubted that the lawmakers intended that the prohibition against receiving any emoluments except their salaries should receive such a strained construction, nevertheless, I call your attention to the fact that the law provides that these officials "during their terms of office shall reside within the Canal Zone". We are, therefore, compelled to look to the Panama Canal Government for quarters at such rental as may be prescribed.

Therefore, I beg to call your attention to my letter to you of May 26th with regard to the assignment to me of a house for the use of myself and family, and, in this connection, I would respectfully request that I have the privi-

lege of renting the house at present occupied by Mr. Bishop at such rental as may be fixed by the Government for its use and occupation. I understand Mr. Bishop is leaving the third of July and that thereafter this house may be used for a short time by Mr. Rousseau and his family. After that time I should like the privilege of renting it for the use of my own family.

In making this application I am guided by many consideration of considerable personal convenience for myself and family. In the first place there is the propinquity of this house to the old administration building where, I understand, the Court and the office of the judge is eventually to be located. Also the fact that I have purchased two horses from Mr. Bishop that are stabled in the Ancon corral and it would be very inconvenient for me to make use of them if I am to live so far away as Balboa. The most important consideration of all however is that at present I have stored in New York City a considerable quantity of furniture, a number of pictures and other personal effects, which, in consideration of the four years I expect to remain on the Zone, I would like to bring down here for the purpose of making use of them in my residence on the Zone.

The house I have at present is not large enough for that purpose. A house the size of Mr. Bishop's or the one occupied formerly by Mr. Metcalfe would give me the opportunity of bringing all my personal effects from the States down here and making use of the same during my stay.

Hoping in consideration of the above that I may have the privilege of renting one of these houses, preferably the one occupied at present by Mr. Bishop, I am,

Respectfully,

(SGD) WM. H. JACKSON,
WHJ/t District Judge.

Capt. Wood:
Comment.

(SGD) G.
2 D 12

174 RESPONDENT'S EXHIBIT 6.

Ancon, July 11th, 1914.

Col. Geo. W. Goethals,
Governor,
Culebra, C. Z.

Sir:

Referring to my letters to you of May 26th and June 29th bearing upon the question of a house, and especially with reference to my letter of the 29th requesting that I be allowed to rent the house formerly occupied by Mr. Bishop:

I am without any reply to either of these letters except a memorandum from your office stating that my letter of the 29th had been referred to Captain R. E. Wood for comment.

As my wife is contemplating going to the States at an early day and wishes while there to make arrangements for the shipping of my household effects to Ancon in the event that we are granted the privilege of renting the Bishop house after Mr. Rousseau and his family shall have ceased to occupy it, I would esteem it a favor if you could give me an early reply to my request.

Respectfully,

Sgd) WM. H. JACKSON,
District Judge.

175 RESPONDENT'S EXHIBIT 7.

Copy.

Culebra, August 10, 1914.

Memorandum for the Governor:

Rental rates for Gold Quarters

In reference to the attached correspondence:

I note Mr. Rousseau's and Colonel Hodges memoranda:

I am not in favor of any rental based on a percentage of salary.

* * * * * * * * * *

Practically, I believe it would be a better scheme to include the cost of kindling as a flat charge covered by the rent. I included coal in the rental as far as Judge Jackson's house was concerned because I was called upon to report on the rental of his particular house and, if we are obliged to charge for coal furnished in April, May and June, we have no means of determining the exact amounts furnished Judge Jackson, during the period.

* * * * * * * * * *

Roughly, the desirability of the houses varies with the cost and the safest method of determining rental is one based on the original cost of the building and an average rate of depreciation.

(SGD)

R. E. WOOD,
Chief Quartermaster.

Attachment--File.
REW/f
ald
$25 for type 8 exclusive of lights.
$55 for Bishops House exclusive of lights.
(SGD)
11 A 21 G.

176 RESPONDENT'S EXHIBIT 8.

Balboa Heights,
September 11, 1914.

Memorandum for the Governor:

Rental of Judge Jackson's House.

Has any action been taken relative to the rental of the house occupied by Judge Jackson?

(SGD)

R. E. WOOD,
Chief Quartermaster.

177 RESPONDENT'S EX. 9.

Copy.

Balboa Heights,
September 24, 1914.

Hon. Wm. H. Jackson,
District Judge,
Ancon, Canal Zone.

Sir:

Referring to your recent application to the Governor requesting that you, be assigned the Bishop house. This house can be assigned to you as soon as Mr. Rousseau's house is completed and as soon as the latter moves. A rental of $25 a month inclusive of lights has been fixed for the house you are now occupying. A rental of $55 a month, exclusive of lights has been fixed for the Bishop house.

Will you kindly advise as soon as possible whether you desire to receive assignment to the Bishop House when same becomes vacant.

Respectfully,

.....
Chief Quartermaster.

REW-rrh.

178 RESPONDENT'S EX. 10.

District Court of the Canal Zone.

Ancon, September 25, 1914.

Capt. R. E. Wood,
Chief Quartermaster,
Balboa Heights, C. Z.,

Sir:

Replying to yours of the 24th inst, in which you say that the Bishop House can be assigned to me as soon as Mr. Rousseau's house is completed and as soon as the latter moves:

You will recall my personal conversation with you recently in which you requested that I surrender my present house upon my leaving for the States for my annual vacation and that I could accept an assignment of the Bishop House dating from the time of my return from the States with my family. I expect to leave for the States either October 10th or October 17th, depending upon how I may be able to dispose of the press of business in my Court at present. I will be glad to surrender possession of my present house upon my leaving for the States, if your department would kindly store my belongings for me pending my return, and upon my return, which will be about the latter part of November, I will be glad to avail myself of renting the Bishop House at the rental stipulated in your letter.

This arrangement I understand to be in accordance with our recent personal conversation and I will be glad to hear from you by letter confirming the same.

Respectfully,

(Sgd.) WM. H. JACKSON,
District Judge.

WHJ/t

179 RESPONDENT'S EX. 11

Balboa Heights,
September 28, 1914.

Mr. R. R. Watson,
District Quartermaster,
Ancon, C. Z.

Sir:

Quarters for Judge Jackson, et al.

Please note and return the attached letter from Judge Jackson.

If Judge Jackson gives up his house on his departure for the States, you can store his effects and assign him to the Bishop House upon his return. If he gives up his house, Mr. Clear can move in at once and Judge Jackson's rent

will stop at the time he vacates. The rental for the Bishop House will be $55 per month, exclusive of lights, and will begin on the date of occupancy.

Respectfully,

(Sgd.) R. E. WOOD,
Chief Quartermaster.

Encl. Ltr. Judge Jackson 9-25-14.

180 RESPONDENT'S EX. 12.

Ancon, October 1, 1914.

Captain R. E. Wood,
Chief Quartermaster,
Balboa Heights, C. Z.

Sir:

Quarters for Judge Jackson.

Returning herewith correspondence in regard to quarters for Judge Jackson.

We will comply with instruction in regard to storing his effects and re-assigning him to house No. 115 on his return from leave.

Respectfully,

(Sgd.) ROY R. WATSON,
District Quartermaster.

Enc. Judge Jackson's ltr. 9-25-14.

181 RESPONDENT'S EX. 13.

Copy.

Balboa Heights,
October 19, 1914.

Memorandum for the Governor:

Under date of June 23rd, 1914, the Comptroller, in reply to your letter of June 1st, rendered a decision to the effect that the District Judge, District Attorney and Marshal, were not employees of The Panama Canal, but officers with salaries fixed by law and therefore not entitled to government quarters free of rent.

On or about August 10th you approved a recommendation to the effect that the District Judge should pay a monthly rental of $25.00 per month for the Type 8 which he is now occupying and to pay $55.00 when he moves into the Bishop House, exclusive of lights in both instances, rent for house heretofore occupied to start from May 1st, 1914, in accordance with a decision rendered by the Auditor of his case. This rental has never been collected but the matter will be turned over to the Collector at once with the necessary information as to date rental begins.

District Attorney Jackson has been occupying a room in a type 5 (bachelor quarters) at Ancon since his appointment and no rental has been fixed nor payments made. Authority is therefore requested to fix a monthly rental of $8.00 per month, including light, for the room which he occupies, payment to start from the date of his appointment, viz: April 1st.

The District Marshal, W. H. May, along with two other employees of The Panama Canal, is occupying an entire type 10 building at Ancon. This is a two-store family quarters and authority is requested to fix a monthly rental of $12.00 for his share of the quarters. According to your decision in the case of Judge Jackson, Mr. May should be charged for the light, but as the building is occupied by two other employees, who are not required to pay rent, and has no meter attached, it is recommended that the rate of $12.00 be considered to include light.

Upon receipt of instructions the Collector will be advised of your decision and collection made accordingly.

Respectfully,

(SGD) WM. R. GROVE,

Chief Quartermaster.

Approved.

(SGD) G.

182 RESPONDENT'S EXHIBIT 14.

Copy.

Balboa Heights, October 21, 1914.

Memorandum for the Auditor:

Collection of Rentals.

Herewith copy of my memorandum to the Governor covering rent of Judge Jackson, District Attorney Jackson and Mr. May, which has been approved by the Governor.

Will you please arrange to collect the rentals as provided in this memorandum.

(SGD.) W. R. GROVE,
Chief Quartermaster.

WRG:F

Encl.—Copy of Memo to Gov. 10/19/14.

183 RESPONDENT'S EXHIBIT 15.

Ancon, December 1, 1914.

Memorandum for the Auditor:

Judge W. H. Jackson returns from leave and has moved into his new quarters—house No. 115—on this date, December 1st.

Rent charges should begin with the month of December at the rate of $55.00 per month.

Respectfully,
(Sgd.) ROY R. WATSON,
District Quartermaster.

CC—Chief Quartermaster.

184 RESPONDENT'S EXHIBIT 16.

Copy.

Ancon, December 12, 1914.

Col. George W. Goethals,
Governor, Panama Canal,
Balboa Heights.

Sir:

I have been favored with a copy of a letter to you from the District Attorney dated the 10th inst., in which he requests that the question of the rental charges against the District Judge, the District Attorney, and the Marshal,

be again submitted to the Comptroller, and that he be requested to review his former decision. I have carefully read the letter in question, and I respectfully beg to add my request to that of the District Attorney.

In this connection I have but little to add to what is so clearly stated in the letter of the District Attorney, but it seems to me clear that the prohibition against "emoluments" in the Panama Canal Act refers unquestionably to those of a pecuniary nature as defined in the citations referred to in the letter of the District Attorney. For instance, it is well known that for a long time there were many "emoluments" of a pecuniary nature pertaining to the offices of Marshal and Clerk of the United States District Courts, which I believe are now prohibited by law, and there are still pecuniary "emoluments" pertaining to the offices of District Judges and District Attorneys in the States, as for instance, the District Judge in the States when holding Court outside of the District of his residence is allowed $10.00 per day in addition to his regular salary notwithstanding his actual expenses may be considerably less than this sum of $10.00 per diem, but this is an "emolument" which the law allows in the States. It was to prohibit this and all similar pecuniary "emoluments" attaching to the offices of District Judge, District Attorney, and Marshal, that the prohibition in question was enacted. It seem to me clear that it was not intended to prevent these officials from enjoying a privilege which was enjoyed by all employees of the Panama Canal, especially when it is remembered that the law specifically provides that said officials must, during their term of office, reside within the Canal Zone, and there are no quarters in the Canal Zone available for use except those of the Panama Canal Government, which, according to custom, have been let free to officials of the Zone Government and other officials of the United States Government.

In this connection I might further mention a pecuniary "emolument" which I as District Judge was prohibited from receiving. It may be recalled that after qualifying as Judge of the District Court I continued to act as Judge

of the Supreme Court for the purpose of closing up the pending business in said Court without any compensation whatsoever, thereby, I may say, saving the government considerable by way of delay and extra expense that would have been attendant upon the appointment of another judge of the Supreme Court. But, in addition
185 to this, I was, under the ruling of the Comptroller, prohibited from receiving the accumulation for the months of May and June, which was received by Judges Gudger and Brown. This accumulation, by way of a cash payment, which I was prohibited from receiving, was unquestionably considered as a pecuniary "emolument" and, as such, within the purview of the prohibition against the receipt of "emoluments." But it seems to me there was no intention on the part of the law makers to go further and prohibit the Judge the free use of quarters, which at the present time are allowed free to all Panama Canal employees. In my particular case the rental charge falls with especial severity as I have received a bill amounting to $170.07 itemized as follows:

For electric light, May 1 to Oct. 17, 1914, 5 months, 17 days, at $5.55 per month	$30.90	
Rental of quarters, May 1 to Oct. 17, 1914 5 months, 17 days, at $25.00 per month	$139.17	$170.07

A very considerable sum when it is considered that other government employees have been receiving like privileges during the same period of time free of charge. I would, therefore, respectfully request that the matter be again submitted for a review of the question involved, and that in the meantime I may defer payment of the bill in question pending the final decision.

Respectfully,

(SGD) WM. H. JACKSON,
District Judge.

Mr. H. A. A. Smith:

In connection with Mr. Jackson's letter.

(SGD) G.

Respondent's Exhibit 17—Decision of Comp-
186 troller dated December 28, 1914, omitted from the Printed Record, being heretofore copied at page 24, as Exhibit "D" to the Answer.

* * * * * * * * * *

Respondent's Exhibit 18—Decision of Comp-
188 troller, dated April 6, 1915, omitted from the Printed Record, being heretofore copied at page 46, as Exhibit No. 1 to Answer to Amended Petition.

* * * * * * * * * *

Respondent's Exhibit 19—Decision of Attorney
190 General dated July 8th, 1915, omitted from the Printed Record, being heretofore copied at page 34, as Exhibit "H" to Answer.

* * * * * * * * * *

Respondent's Exhibit 20—Decision of Comp-
191 troller, dated September 16, 1915, omitted from the Printed Record, being heretofore copied at page 26, as Exhibit "E" to Answer.

* * * * * * * * *

192 RESPONDENT'S EXHIBIT 20.

Washington Office
The Panama Canal
October 5, 1915.

Official copy respectfully forwarded to the Governor of The Panama Canal, Balboa Heights, Canal Zone, for his information and files.

F. C. BOGGS,
Major Corps of Engineers, U. S. A. Chief of Office.

CC to following:
Judge Frank Feuille, Ancon,

The Auditor, Balboa Heights,
The Paymaster (through the Auditor,) Balboa Heights,
The Executive Secretary, Balboa Heights,
The District Attorney, Ancon.
(Copied by RTT.) Copy

193 RESPONDENT'S EXHIBIT 21.

Ancon, Canal Zone, Sept. 21, 1915.

The Acting Governor, The Panama Canal,
Balboa Heights, Canal Zone.

Sir:

We acknowledge the receipt of your letter of September 13th, enclosing a letter from the Secretary of War dated August 28th, relative to the question of our being liable for payment of charges for rent for quarters, fuel and lights, and we note the method proposed by the Secretary of War for handling this question.

The method proposed by the Secretary of War is perfectly satisfactory to us, and is in fact the course of action we had in mind when we stated in our letter to you of August 5, 1915:

"In case the Attorney General should decide that we are liable for these charges, we desire to pay them without being sued."

If, after the Secretary of War has ordered a suit brought, the Attorney General is of the opinion that we are liable, we desire to pay the charges in question without having the suit brought against us.

We approve this method of handling the question and will promptly pay the charges if the Attorney General is of the opinion that we are liable and should pay them.

Respectfully,

(Sgd) CHARLES R. WILLIAMS,
District Attorney.

(Sgd) WILLIAM H. MAY,
Marshal.

194 Respondent's Exhibit 22—Decision of Attorney General dated December 21st, 1915, omitted from the printed record, being heretofore copied at page 36, as Exhibit "I" to Answer.

* * * * * * * * *

195 RESPONDENT'S EXHIBIT 23.

Copy
L

Ancon, January 8th, 1916.
Noted
H. A. A. Smith, Comment.
(Sgd) G.

Major General Geo. W. Goethals,
Governor, Panama Canal,
Balboa Heights, C. Z.

Sir:

Referring to my personal conversation with you in your office some recent date with reference to the question of the liability of the judge, district attorney and marshal for the payment of rent for quarters:

You may recall my request that in the event we were compelled to pay rent, that you would consider an application from me for a reduction in the amount of rent pending such time as all other employees may be required to pay for the use of quarters.

I have understood unofficially from Mr. May and Mr. Williams that the Attorney General is of the opinion that we should pay rent. But inasmuch as neither the Attorney General or Comptroller of the Treasury has to do with the amount, and as I am sure that it would appear to anyone an individual hardship based upon a technical construction of the law that we should be compelled to pay for rent when others are not so doing, I would respectfully request of you that until such time as general charges for rent shall be made, I be allowed to occupy the quarters at present used by myself and family at a rental not to exceed $25.00 per month.

Of course when the general order for the payment of rent goes into effect I would expect to have this increase and to pay on the same basis as all others occupying similar houses. Sincerely trusting this may meet with your favorable consideration, I am

Respectfully,

(Signed) WM. H. JACKSON,
District Judge.

196 RESPONDENT'S EXHIBIT 24.

Copy
L

Balboa Heights,
January 14, 1916.

Honorable William H. Jackson,
District Judge, Canal Zone,
Ancon, C. Z.

Sir:

I beg to acknowledge receipt of your letter of the 8th instant, relative to reduction in amount of rent on the house that you occupy, which has been given consideration.

The rent for the house in question was fixed in comparison with rentals charged for quarters of various types, without regard to the amount of original investment by the Government. In comparison, $50.00 a month is certainly a reasonable figure. To reduce the rent 50% as you suggest would necessitate similar consideration for all other houses which are being rented from The Panama Canal. It would also establish a bad precedent should the rent order again take effect—which it must unless Congress specifically provides that rent shall not be charged. I do not feel that I am justified in making the reduction you desire.

In the regulations establishing the rent, it is provided that 80% shall be added when houses are rented to persons in the Government service, but not employees of the Canal, so that for the quarters now rented by the Army and by a member of the Joint Land Commission there is being

charged the rent fixed originally, plus 80%. The Auditor holds that 80% should also be added to the rental of houses occupied by yourself, the District Attorney, and the Marshal, and asks that the matter be referred
197 to the Comptroller of the Treasury for decision. In bills prepared by him for rent this 80% is added. I have ruled, however, that it shall not be applicable to yourself, the District Attorney, or the Marshal, so that you are relieved of an additional burden which, under a strict interpretation, would probably be held as applicable to you.

Respectfully,
(Signed) GEO. W. GOETHALS,
Governor.

198 RESPONDENT'S EXHIBIT 25.

Copy
L

Ancon, January 26th, 1916.
(Major Grove, Comment.)
(Sgd). J. J. M.

Colonel Jay J. Morrow,
Acting Governor,
Balboa Heights, C. Z.

Sir:

It having been ruled by the Auditor of the Panama Canal and the Comptroller of the Treasury that I am compelled to pay rent for the use of my house, as well as for electric lights, etc., and the Governor, in a letter to me of January 14th, having fixed the rental of the house I am now occupying at $50.00 a month, I am writing to say that not being financially able to meet this expense I would like to apply for the rental of smaller and cheaper quarters.

I would like, if possible, to secure cheaper quarters in the neighborhood of the old administration building where I am to have my Court. If there are no quarters available at the present time I would suggest that whereas all

the other officials except the District Attorney, Marshal and myself have houses assigned to them free of charge, that some of these officials might be willing to take my larger house free so that I might be transferred to a smaller house at less rental. It is possible that Dr. Guthrie might be pleased to move to my larger house and that I might take his house for less rent.

In case I am compelled to move I would also like to know if charges would be made for moving my personal effects. If so, the rate of such charges.

Very Respectfully,

(Signed) WM. H. JACKSON,
District Judge.

199 RESPONDENT'S EXHIBIT 26.

Copy
L

Balboa Heights,
February 8, 1916.

Judge Wm. H. Jackson,
Ancon, C. Z.

Sir:

I have to acknowledge receipt of your letter of January 27th, in which you request that you be allowed to transfer to smaller and cheaper quarters on account of the decision of the Attorney General that you will be required to pay rent, and beg to advise that while it is true that an official of the Panama Canal who is at present entitled to quarters free of rent might advantageously use your house, unless Congress or the President takes action in the meantime, all employees and officials of the Panama Canal will pay rent beginning July 1st of this year. During the time rent was being collected from Canal officials, the Governor declined to allow an official to move from a large house to a smaller one in order to get a lower rent, taking the position that the higher priced houses should go to the officials drawing the higher salaries.

In view of these facts, I am constrained to disapprove your request until rent is again collected from Canal Employees when the matter may be again considered if you so desire it and some other official is willing to take your house at the higher rate.

Respectfully,

(Signed) JAY J. MORROW,
Acting Governor.

CC-Chief Q. M.

200 RESPONDENT'S EXHIBIT 27.

Balboa Heights, March 11, 1916.

The Honorable
The Secretary of War,
Washington, D. C.

Sir:

I enclose herewith copy of letter addressed to the Comptroller of the Treasury, together with copies of the correspondence attached thereto, requesting his decision on certain questions in regard to the collections of the indebtedness of Judge William H. Jackson for rental and electric current since May 1, 1914, less the amount deducted from his salary to October 17, 1914, and the amount paid by him for the period from March 1 to May 31, 1915. The total due December 31, 1915, was $593.16. As the amount increases at the rate of about $60 per month, the total due March 31, 1916, will be approximately $773.

The amount now due is based upon the rates fixed for the rental of quarters by employees of the Panama Canal during the period from March to May, 1915, although Judge Jackson accepted the house he is now occupying on the basis of a slightly higher rate of rental, in accordance with his agreement as shown in the attached correspondence. The charges for electric current are based upon the prescribed rates fixed for current furnished employees of The Panama Canal; that is, the cost of the service.

The liability of the three judicial officers of the Canal Zone—namely, the District Judge, the District Attorney

and the Marshal—for rental and electric current has been the subject of three decisions of the Comptroller of the Treasury and two opinions—one of which was informal—of the Attorney General of the United States. Judge Jackson has, as is shown in the papers, refused to pay the bills, and it is deemed necessary that some action be taken to enforce collection.

Upon receipt of information that the Attorney General was of the opinion that the District Attorney and Marshal were legally liable to the United States for rental of quarters furnished them, and after giving consideration to the decision of the Comptroller of the Treasury that the accounting officers of the Canal were not authorized to refund to Judge Jackson the amount deducted from his pay on account of the value of rental and electric current for the period May 1 to October 17, 1914, it was first thought advisable to withhold further payment of salary until his indebtedness was cancelled. In view, however, of the Attorney General's opinion that there was no law authorizing the deduction of the amount due from Judge Jackson's compensation, and the fact that the Comptroller's decision was as to the right to make a refund after a deduction had been consummated, it was deemed desirable to obtain a more positive ruling upon the questions involved.

The decision of the Comptroller of the Treasury is desired before any further payments are made in order to protect the Paymaster of the Panama Canal in case the United States should ultimately sustain a loss on account of this indebtedness, and it should be finally determined that payment of compensation was not authorized after the paying officer was officially advised of the outstanding indebtedness.

It is requested that these papers be referred to the Attorney General for his information and with the request that, if it is finally determined that the accounting officers of the Panama Canal are without authority to withhold Judge Jackson's pay in order to enforce collection of his indebtedness, such action be taken by the Department of Justice as may be necessary to enforce payment.

A copy of the bill for rental and electric current to December 31, 1915, also copies of the bills rendered subsequent thereto are attached.

Respectfully,
(Sgd) CHESTER HARDING,
Acting Governor.

Respondent's Exhibit 28—Decision of Comp-
201 troller dated March 25th, 1916, omitted from the printed record, being heretofore printed at page 28, as Exhibit "F" to Answer.

* * * * * * * * * *

206 RESPONDENT'S EXHIBIT 28.

The Panama Canal.
Washington Office.

March 28, 1916.

Official copy respectfully forwarded to the Governor of The Panama Canal, Balboa Heights, Canal Zone, for his information and files.

EARL I. BROWN,
Major, Corps of Engineers, U. S. A.
Chief of Office.

CC to following:
Judge Frank Feuille, Ancon,
The Auditor, Balboa Heights,
The Paymaster (through the Auditor), Balboa Heights,
The Executive Secretary, Balboa Heights,
The District Attorney, Ancon,
The Chief Quartermaster, Balboa Heights.
(Copied by RTT.)

Copy.

207 RESPONDENT'S EXHIBIT 29.

Cablegram.
Received.
No. 58.

Washington, D. C.
March 28, 1916.

Pancanal - Panama:

Referring to our cable of the 17th instant—Civil Service Commission has approved transfer of Clough.

Referring to your letter of the 11th instant—Comptroller of the Treasury decides, "In reply to the two specific questions submitted, you are advised that if you are satisfied that Judge Jackson is indebted to the United States in the sum of $593.16 as stated, or any other amount, payment of salary to the amount of the debt should not be made by the paymaster of The Panama Canal but the claimant should be left to submit claim for unpaid salary to the Auditor for the War Department or take such other action as he may elect. The same rule should be applied every month in the case of all persons indebted to the United States."

BROWN,

208 RESPONDENT'S EXHIBIT 30.

Ancon, April 1, 1916.

Mr. H. A. A. Smith,
Comment
(Sgd.) G.

General George W. Goethals,
Governor, Panama Canal,
Balboa Heights,

Sir:

Enclosed herewith I hand you copy of letter of March 29th received by me from Acting Col. Chester Harding, quoting a cablegram received from the Comptroller of the Treasury, advising me that in view thereof no further payment of salary will be made to me until the amount withheld equals my alleged indebtedness for rent and electric light. I also enclose copy of my reply thereto of March

31; and, as bearing upon the right to withhold my salary for such alleged indebtedness, I again call your attention to the letter of July 8, 1915, from the Attorney General to the Secretary of War, in which the Attorney General says as follows:

"I am of the opinion however, that the United States District Attorney, the United States District Judge and the United States Marshal, serving in the Canal Zone are not 'employees' within the meaning of this provision. Consequently since there is no other statute authorizing the deductions it must be held that the Auditor is without authority to make them.

"From this answer to your second question it follows that any claim which the Government may have against these officers for the occupancy of quarters during the period from April 1, 1914 to March 1, 1915, can only be enforced thru proceedings in the Courts."

Furthermore, if my memory serves me aright, I recall your having stated to me during a conversation in your office relating to the matter of my obligation for rent and electric light, in which I protested against there having been withheld from my salary on a previous occasion the sum of $170.70, that there would be no further reductions from my salary on this account, but that, acting upon the opinion of the Attorney General, bills
209 would be rendered, and, if not paid, the matter would be referred to the Attorney General for such action as he might take. I trust that you are still disposed to adhere to this determination as expressed by you to me on that occasion. But if not, permit me to state that, inasmuch as my salary furnishes the only means I have for the support of myself and my family, I trust you will advise me at an early date of your decision in the matter as, in the event of an adverse decision, I will, of course, be compelled to institute proceedings for the enforcement of my rights.

Respectfully.

(Sgd) WM. H. JACKSON,
District Judge

210 RESPONDENT'S EXHIBIT 31.

Balboa Heights,
April 13, 1916.

Hon. William H. Jackson,
District Judge,
Ancon, C. Z.

Sir:

The receipt is acknowledged of your letter of April 1st, relative to the decision of the Comptroller of the Treasury that no further payment of salary will be made to you until the amount charged, which includes your indebtedness for rent and electric light, is remitted.

In view of your statement that your salary furnishes the only means for the support of yourself and family, I cabled to the Washington office to see whether it would be possible to make part payment of your salary, so as to separate the collection of indebtedness over several months. In reply to this, I am just in receipt of the following:

"Comptroller advises has no authority further to extend unauthorized credit heretofore given or to authorize Disbursing Officer to make payment of salary to one clearly indebted to the Government."

I remember no part of a conversation on this subject which could be interpreted to mean that there would be no further reductions from your salary on account of your rent and electric lights, for I have not that control over the Disbursing Officer that is necessary to carry inforcement. In his disbursements that officer is guided entirely by the decisions of the Comptroller of the Treasury, and, as I explained to you, these at times differ materially from the opinions of the Attorney General.

I regret that I am unable to assist you in the matter.

Respectfully,

(SGD) GEO. W. GOETHALS,
Governor.

211 RESPONDENT'S EXHIBIT 32.

Exhibit "A"

Balboa Heights, Canal Zone,
April 28, 1916.

Wm. H. Jackson, U. S. District Judge,
Ancon, Canal Zone.

To the United States of America,
The Panama Canal Debtor.

For rent of house No. 118, Ancon, from May 1st to October 17th, 1914, 5 months 17 days at $25 per month		$ 139.17
Electric current, same period at $5.55 per month,		30.90
Rent of house No. 311, (old No. 155) Ancon, from December 1, 1914, to April 30, 1916, 17 months at $50.00 per month		850.00
Electric current December 1, 1914, to January 31, 1915, at $7.00 per month		14.00
Electric Current February 1, 1915, to March 31, 1916, 6840 K.W.H. at 2c per K.W.H		136.80
		$1170.87
Less amount due on account of house No. 118, Ancon, deducted on pay roll for December, 1914	$170.07	
Various payments, March to June, 1916	177.50	
		347.57
		$823.30
Medical services rendered, as per Ancon dispensary certificate No. 9932 dated February 1, 1916		2.00
Balance due		$ 825.30

212 RESPONDENT'S EXHIBIT 33.

Balboa Heights, April 29, 1916.

Pancanal - Washington.

Referring to your letter of March 28th, Judge Jackson's indebtedness. Present matter to Attorney General.

GOETHALS.

wpc/alb

[Indorsed on Back.] District Court, Canal Zone.
213 Civil No. 107, William H. Jackson, Relator, v. H. A. A. Smith, Auditor of The Panama Canal, Respondent. Mandamus. Respondent's Bill of Exceptions. Filed July 18, 1916. Charles R. Williams, Attorney for Respondent.

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214 PETITION FOR WRIT OF ERROR.

'United States of America.
Panama Canal.

In the District Court in and for the Division of Balboa, Canal Zone.

William H. Jackson, Relator,
vs.
H. A. A. Smith, Auditor of The Panama Canal, Respondent.

Mandamus

Comes now the above-named respondent, by his counsel, and complains that in the record and proceedings had in said cause, and also in the rendition of the judgment of the Court in said cause, manifest error hath happened to the great damage of said respondent, and prays for the allowance of a Writ of Error to the Honorable, The United States Circuit Court of Appeals for the Fifth Circuit, under and according to the laws of the United States, in that behalf made and provided, and also that an order

be made fixing the amount of the security which the respondent shall give and furnish upon said Writ of Error, and that upon the giving of such security all further proceedings in this Court be suspended and stayed until the determination of said Writ of Error by the said United States Circuit Court of Appeals for the Fifth Circuit, and your petitioner will ever pray.

(sgd) CHARLES R. WILLIAMS,
Counsel for Respondent.

Filed July 18th, 1916, in the office of the Clerk of the District Court, Canal Zone.

(sgd) E. M. GOOLSBY, Clerk.

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215 ASSIGNMENT OF ERRORS.

United States of America.
Panama Canal.

In the District Court in and for the Division of Balboa, Canal Zone.

William H. Jackson, Relator,

vs.

H. A. A. Smith, Respondent.

Mandamus
Assignment of Errors.

Now comes the above-named respondent, H. A. A. Smith, the plaintiff in error, by his counsel, Charles R. Williams, and says that in the record and proceedings in the above-entitled cause there is manifest error in this, to-wit:

First: That the Trial Court erred in over-ruling the respondent's demurrer and oral motion to strike relator's replication.

Second: That the Trial Court erred in overruling and refusing to grant respondent's motion, made at the close of the testimony and before argument upon the case, to dismiss relator's petition for mandamus, on the ground that the admitted and uncontroverted facts showed that relator was not entitled to the mandamus as against this respondent; and because the Auditor of the Treasury Department of the United States, known as the Auditor for the War Department, is and was the legal auditor for The Panama Canal.

Third: That by said record it appears that judgment was given for the said relator, when judgment should have been given in favor of said respondent and against said relator.

Wherefore, the said H. A. A. Smith, respondent and plaintiff in error, prays that the judgment of the Court be in all things reversed.

(sgd) CHARLES R. WILLIAMS,
Counsel for Respondent and Plaintiff in error.

Approved and ordered filed this 18th day of July, 1916.
(sgd) H. D. CLAYTON,
United States District Judge Presiding.

Filed July 18th, 1916, in the office of the Clerk
216 of the District Court, Canal Zone.
(sgd) E. M. GOOLSBY, Clerk.

WRIT OF ERROR

United States of America.
Panama Canal.

In the District Court in and for the Division of Balboa, Canal Zone.

William H. Jackson, Relator,
vs.
H. A. A. Smith, Auditor of The Panama Canal, Respondent.

Mandamus

The President of the United States of America to the Honorable Henry D. Clayton, United States District Judge presiding in and for the District of the Canal Zone. Greeting:—

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court of the Canal Zone, before you, between William H. Jackson, Relator, and H. A. A. Smith, Respondent, a manifest error has happened, to the great prejudice and damage of the said respondent, H. A. A. Smith, as is said and appears by the petition of the said respondent.

We, being willing that error, if any hath been, should by duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the United States Circuit Court of Appeals for the Fifth Circuit, in the City of New Orleans, in the State of Louisiana, together with this writ, so as to have the same at the said place in said circuit on the 17th day of August, 1916, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct those errors what of right, and according to the laws and customs of the United States, should be done.

217

Witness, the Honorable Edward Douglas White, Chief Justice of the Supreme Court of the United States, this 18th day of July, 1916.

Attest my hand and seal of the District Court for the Canal Zone, at the clerk's office at Ancon, Canal Zone, on the day and year last above written.

(sgd) E. M. GOOLSBY,
Clerk of the District Court of the Canal Zone.

Allowed this 18th day of July, 1916.

(sgd) H. D. CLAYTON,
United States District Judge, presiding in and for the District of the Canal Zone.

Service of within writ of error and receipt of a copy thereof is hereby admitted this 18th day of July, 1916.

(sgd) C. P. FAIRMAN,
Attorneys for defendant in error.

I hereby certify that a true copy of the within Writ has this day been lodged in the Clerk's Office for the use of the defendant in error.

Dated 18th day of July, A. D., 1916.

(Sgd) E. M. GOOLSBY,
Clerk of Court.

Filed July 18th, 1916, in the office of the Clerk of the District Court, Canal Zone.

218 BOND.

United States of America.
Panama Canal.

In the District Court in and for the Division of Balboa, Canal Zone.

William H. Jackson, Relator,
vs.
H. A. A. Smith, Auditor of The Panama Canal, Respondent.

Mandamus

Know all men by these presents, that we, H. A. A. Smith, Auditor of the Panama Canal, as principal, and D. C. Nutting and W. R. Grove, as sureties are held and firmly bound unto William H. Jackson, relator above-named in the sum of Five Hundred dollars, to be paid to the said William H. Jackson, his executors or administrators, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors, representatives, and assigns, firmly by these presents.

Sealed with our seals and dated the 18th day of July, 1916.

Whereas, the above-named respondent, H. A. A. Smith, has sued out a writ of error to the United States Circuit Court of Appeals, for the Fifth Circuit, to reverse the judgment in the above-entitled cause by the District Court of the Canal Zone.

Now, therefore, the condition of this obligation is such that if the above-named H. A. A. Smith, respondent, shall prosecute said Writ to effect and answer all costs and damages, if he shall fail to make good his plea, then this

obligation shall be void; otherwise to remain in full force and virtue.

(sgd) H. A. A. SMITH,
Auditor of the Panama Canal
(sgd) By AD. FAURE,
Acting Auditor of Panama Canal.
(sgd) D. C. NUTTING,
Surety.
(sgd) W. R. GROVE,
Surety.

Approved this July 15-16.
(sgd) H. D. CLAYTON,
Attest:
(sgd) E. M. GOOLSBY,
Clerk, District Court of the Canal Zone.

Filed July 18th, 1916, in the office of the Clerk of the District Court, Canal Zone.
(sgd) E. M. GOOLSBY, Clerk.

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219 SUPERSEDEAS

United States of America.
Panama Canal.

In the District Court in and for the Division of Balboa, Canal Zone.

William H. Jackson, Relator,
vs.
H. A. A. Smith, Auditor of The Panama Canal, Respondent.

Mandamus

The respondent, H. A. A. Smith, having this day filed his petition for a writ of error from the decision and judgment thereon made and entered herein, to the United States Circuit Court of Appeals in and for the Fifth Cir-

cuit, together with an assignment of errors within due time, and also praying that an order be made fixing the amount of security which respondent should give and furnish upon said writ of error, and that upon the giving of said security, all further proceedings of this Court be suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals in and for the Fifth Circuit, and said petition having this day been duly allowed:

Now, therefore, it is ordered, that upon the said respondent, H. A. A. Smith, filing with the clerk of this Court a good and sufficient bond in the sum of Five Hundred dollars, to the effect, that if the said respondent, H. A. A. Smith, and plaintiff in error shall prosecute the said writ of error to effect, and answer all damages and costs if he fails to make his plea good, then the said obligation to be void; else to remain in full force and virtue, the said bond to be approved by the Court that all further proceedings in this Court be, and they are hereby suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals for the Fifth Circuit.

220 (sgd) H. D. CLAYTON,
United States District Judge, Presiding.

Dated, Ancon, Canal Zone, July 18th, 1915.

Filed July 18th, 1916, in the office of the Clerk of the District Court, Canal Zone.

(sgd) E. M. GOOLSBY, Clerk.

CERTIFICATE OF CLERK

I, E. M. GOOLSBY, Clerk of the District Court of the Canal Zone, do hereby certify that the foregoing 62 pages and inserts contain a true and correct copy of the proceedings and orders authorizing the prosecution of a writ of error to the United States Circuit Court of Appeals for the Fifth Circuit in the above styled cause; and I further certify that the foregoing 62 pages and inserts contain a true and complete transcript of all the material proceedings had upon the trial of the said cause in the District Court of the Canal Zone up to the suing out of the writ of error aforesaid.

In witness whereof, I have hereunto set my hand and the seal of this Court on this 3rd day of August, 1916.

E. M. GOOLSBY,

[Seal] Clerk of the District Court of the Canal Zone.

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and Submission.

Extract from the Minutes of January 24, 1917.

No. 2997.

H. A. A. SMITH, Auditor of the Panama Canal,

versus

WILLIAM H. JACKSON.

On this day this cause was called, and, after argument by Benjamin F. Harrah, Esq., and Walter W. Warwick, Esq., for plaintiff in error, and Stevens Ganson, Esq., for defendant in error, was submitted to the Court.

Opinion of the Court.

Filed February 15th, 1917.

In the United States Circuit Court of Appeals, Fifth Circuit.

Number 2997.

H. A. A. SMITH, Auditor of the Panama Canal, Plaintiff in Error,

versus

WILLIAM H. JACKSON, Defendant in Error.

Error to the District Court of the Canal Zone.

Before Pardee and Walker, Circuit Judges, and Grubb, District Judge.

By the COURT:

The elaborate opinion of Judge Clayton covers the entire case and fully justifies the judgment rendered.

We find none of the assignments of error well taken.

Judgment affirmed.

Judgment.

Extract from the Minutes of February 15, 1917.

No. 2997.

H. A. A. SMITH, Auditor of the Panama Canal,

versus

WILLIAM H. JACKSON.

This cause came on to be heard on the transcript of the record from the District Court of the Canal Zone, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause, be, and the same is hereby, affirmed.

Petition for Writ of Error and Order Allowing Same.

Filed March 3d, 1917.

United States Circuit Court of Appeals for the Fifth Circuit.

No. 2997.

H. A. A. SMITH, Auditor of the Panama Canal, Plaintiff in Error,

versus

WILLIAM H. JACKSON, Defendant in Error.

Petition for Writ of Error.

Petition for Writ of Error from the Supreme Court to the Circuit Court of Appeals for the Fifth Circuit.

Your petitioner, H. A. A. Smith, Auditor of The Panama Canal, Plaintiff in Error in the above entitled cause, by his attorney, respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Fifth Circuit and that a judgment was rendered therein on the fifteenth day of February, 1917, affirming a judgment of the District Court of the Canal Zone; that the matter in controversy in said suit exceeds one thousand dollars, besides costs; that the jurisdiction of none of the courts above mentioned is or was dependent in any wise upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of the different States; that this cause does not arise under the patent laws, nor the copyright laws, nor the revenue laws, nor the criminal laws, and that it is not an admiralty case; that it is a proper case to be reviewed by the Supreme Court of the United

States upon writ of error for the reason that the controversy involves, besides costs of suit, a sum in excess of one thousand dollars and also involves the construction and application of Article III, Section 1, of the Constitution of the United States, the construction and application of the provisions of the Panama Canal Act, approved August 24, 1912, (37 Stat., 560), the construction and application of Section 8 of the Act of July 31, 1894, (28 Stat., 208), the construction and application of other Acts of Congress as follows: The Act of October 22,, 1913, (38 Stat., 209), the Act of March 3, 1875, (18 Stat., 481), and Sections 236 and 1766 of the Revised Statutes of the United States and a denial of the rights and privileges of the plaintiff in error and of the United States under the Constitution and laws referred to and other statutes of the United States, as more fully appears from the assignment of errors filed herewith; and therefore your petitioner respectfully prays that a writ of error be allowed in the above entitled cause directing the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by said plaintiff in error may be reviewed and, if error be found, corrected, according to the laws and customs of the United States.

Your petitioner, the plaintiff in error, further shows that the action in the lower court was against him as Auditor of the Panama Canal and that he has been directed by the Governor of The Panama Canal, in pursuance of directions to the Governor of The Panama Canal by the Secretary of War, to prosecute this writ of error as more fully appears from Exhibits A and B, hereto attached, and that, if judgment in the lower court is affirmed, the cost of this suit and the amount he is directed to cause to be paid by the writ of mandamus will be paid out of the appropriations made for The Panama Canal applicable for that purpose.

He therefore prays that this writ of error may be allowed and supersedeas issued without bond.

Your petitioner, the plaintiff in error, further prays that, if this honorable court shall be of the opinion that this plaintiff in error is not entitled to prosecute this writ without bond, an order will be made fixing the amount of security which the plaintiff in error shall give and furnish upon the said writ of error, and, upon the giving of such further security, all further proceedings in this court shall be superseded and stayed until the determination of said writ of error by the said United States Supreme Court.

(Signed) H. A. A. SMITH,
By CHARLES R. WILLIAMS,
Attorney for the Plaintiff in Error.

(Signed) WALTER W. WARWICK,
BENJAMIN F. HARRAH,
Counsel.

Allowed and without bond under Sec. 1001 R. S.

(Signed) DON A. PARDEE,
Circuit Judge.

March 3, 1917.

EXHIBIT "A."

Filed March 3d, 1917.

The Panama Canal.

Canal Zone.

Executive Department.

Cable Address: "Pancanal, Panama."

BALBOA HEIGHTS, February 21, 1917.

Mr. H. A. A. Smith, Auditor The Panama Canal, Balboa Heights, C. Z.

SIR: The Honorable Newton D. Baker, Secretary of War, has written a letter addressed to me as Governor of The Panama Canal, as follows:

"In the case of H. A. A. Smith, Auditor, Panama Canal, plaintiff in error, versus William H. Jackson, defendant in error, Mandamus, No. 2997, tried in the Fifth Circuit of the Court of Appeals and decided February 15, 1917, you are directed to have Mr. H. A. A. Smith, as Auditor of The Panama Canal, prosecute a writ of error to the Supreme Court of the United States. This case is of great importance to The Panama Canal, in that it involves a question of the authority of the District Court of the Canal Zone to control by writ of Mandamus the ministerial officers of the United States in the Canal Zone, and it is necessary that it should be vigorously prosecuted before the Supreme Court, in order that the jurisdiction of the District Court of the Canal Zone over ministerial officers of the United States in the Canal Zone may be finally determined."

In compliance with this letter and order of the Secretary of War, you are hereby authorized and directed to prosecute a writ of error from the Supreme Court of the United States to the United States Circuit Court of Appeals of the Fifth Circuit, for the purpose of reviewing the decision and judgment of the Circuit Court in the mandamus case of Smith vs. Jackson; and to that end you are ordered and directed to proceed to New Orleans at as early a date as possible for the purpose of perfecting the writ of error and of taking all necessary and proper steps for the purpose of securing a review of the decision and judgment in the said case by the Supreme Court of the United States.

Respectfully,

(Signed) CHESTER HARDING, *Governor.*

Exhibit A.

EXHIBIT "B."

Filed March 3d, 1917.

United States of America.

WAR DEPARTMENT,
WASHINGTON, February 20, 1917.

I hereby certify that the attached paper is a true copy of the letter of the Secretary of War to the Governor of The Panama Canal of February 19, 1917, and forwarded by me to the Governor at Balboa Heights, Canal Zone, on February 20, 1917.

(Signed) EARL I. BROWN,
Major Corps of Engineers, U. S. A., Chief of Washington Office of the Panama Canal.

I hereby certify that Major Earl I. Brown, U. S. Army, who signed the foregoing certificate, is the Chief of the Washington Office of The Panama Canal, and that to his certification as such full faith and credit are and ought to be given.

In testimony whereof I, Newton D. Baker, Secretary of War, have hereunto caused the Seal of the War Department to be affixed and my name to be subscribed by the Assistant and Chief Clerk of the said Department, at the City of Washington, this 20th day of February, 1917.

[SEAL.]

(Signed) NEWTON D. BAKER,
Secretary of War,

(Signed) By JOHN C. SCOFIELD,
Assistant and Chief Clerk.

WAR DEPARTMENT,
WASHINGTON, February 19, 1917.

The Governor the Panama Canal, Balboa Heights, Canal Zone.

SIR: In the case of H. A. A. Smith, Auditor, The Panama Canal, plaintiff in error, vs. Wm. H. Jackson, defendant in error, mandamus, No. 2997, tried in the Fifth Circuit of the Court of Appeals, and decided February 15, 1917, you are directed to have Mr. H. A. A. Smith, as Auditor of The Panama Canal, prosecute a writ of error to the Supreme Court of the United States.

This case is of great importance to The Panama Canal in that it involves a question of the authority of the District Court of the Canal Zone to control by writ of mandamus the ministerial officers of the United States in the Canal Zone, and it is necessary that it should be vigorously prosecuted before the Supreme Court, in order that the jurisdiction of the District Court of the Canal Zone over the minis-

terial officers of the United States in the Canal Zone may be finally determined.

Very respectfully,

NEWTON D. BAKER,
Secretary of War.

Exhibit B.

Assignment of Errors.

Filed March 3d, 1917.

The United States Circuit Court of Appeals, Fifth Circuit.

No. 2997.

H. A. A. SMITH, Auditor of the Panama Canal, Plaintiff in Error,

vs.

WILLIAM H. JACKSON, Defendant in Error.

Assignment of Errors on Writ of Error from the Supreme Court of the United States to the Circuit Court of Appeals.

Now comes the plaintiff in error, H. A. A. Smith, Auditor of The Panama Canal, by his attorney and says that, in the record and proceedings aforesaid of the United States Circuit Court of Appeals for the Fifth Circuit, in the above entitled cause and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of said plaintiff in error in this, to-wit:

First. Said Circuit Court of Appeals erred in entering judgment affirming the judgment of the District Court of the Canal Zone awarding a peremptory writ of mandamus directing and commanding H. A. A. Smith, Auditor of The Panama Canal, the respondent, "to audit, issue and deliver to the said William H. Jackson, as Judge of the District Court of the Canal Zone, the relator herein, the warrant, voucher, or pay check for the sum of eleven hundred thirty-one dollars and seventy-six cents unlawfully withheld by the Auditor of The Panama Canal, the respondent herein, from the salary due this relator and to cause the same to be paid out of the funds appropriated by Congress."

Second. Said Circuit Court of Appeals erred in not reversing the judgment of the District Court of the Canal Zone aforesaid and ordering the said District Court to dismiss the petition of the defendant in error for want of jurisdiction in the said court to proceed in the premises.

Third. Said Circuit Court of Appeals erred in holding that under the local laws of the Canal Zone the District Court of the Canal Zone had jurisdiction to issue the writ of mandamus to control the official action of H. A. A. Smith, Auditor of the Panama Canal, a ministerial officer of the United States in the Canal Zone.

Fourth. Said Circuit Court of Appeals erred in not holding that the use of the writ of mandamus to control the official action of H.

A. A. Smith, Auditor of The Panama Canal, a ministerial officer of the United States in the Canal Zone, was an exercise of the judicial power of the United States under Article III, Section 1, of the Constitution of the United States and that such power had not been and could not be imparted to the District Court of the Canal Zone.

Fifth. Said Circuit Court of Appeals erred in not holding that this was in effect a suit against the United States and that as it had not consented to the act sought to be enforced by the writ, it was a necessary party and, as there was no law by which the United States could be made a party, the Court was without jurisdiction and should have dismissed the petition.

Sixth. Said Circuit Court of Appeals erred in holding that H. A. A. Smith, Auditor of The Panama Canal, was a final auditor and in not holding that the decision of the Comptroller of the Treasury rendered upon the request of the Governor of The Panama Canal under Section 8 of the Act of July 31, 1894, that said payments in question were not authorized, was final and binding upon all executive officers of The Panama Canal, and that H. A. A. Smith, Auditor of the Panama Canal, plaintiff in error, one of the executive officers of The Panama Canal, had no right to allow the claim of William H. Jackson, the defendant in error, after such decision had been rendered and that this decision was a complete defense to the petition for mandamus.

Seventh. Said Circuit Court of Appeals erred in not holding that the accounts of The Panama Canal must be audited by the Auditor for the War Department under the Act of October 22, 1913, (38 Stat., 209), and that the balances certified by the Auditor for the War Department on such accounts, subject to the right of revision by the Comptroller of the Treasury, were final and conclusive under Section 8 of the Act of July 31, 1894, (28 Stat., 207), upon all of the executive officers of The Panama Canal, including H. A. A. Smith, Auditor of The Panama Canal, the plaintiff in error, and that the action of H. A. A. Smith, Auditor of the Panama Canal was not final and conclusive upon the claim of William H. Jackson, defendant in error, and that it was not a necessary action to be taken before the said William H. Jackson, the defendant in error, could present his claim to the Auditor for the War Department for action of that officer thereon.

Eighth. The said Circuit Court of Appeals erred in adopting the opinion of Judge Clayton, sitting as District Judge of the Canal Zone in this case, finding that William H. Jackson, the plaintiff in error, was not indebted to the United States in any sum and that the Auditor of The Panama Canal was not authorized to recommend the withholding of any sum from the salary of William H. Jackson, for the reason that such finding and judgment rendered thereon by the court below could not be made without making the United States a party to the action and, as the United States was not a party and could not be made a party, the finding and judgment thereon by the District Court of the Canal Zone adopted by the said Circuit Court of Appeals was unauthorized and amounted to a denial by said Circuit Court of Appeals of the rights and privileges of H. A. A.

Smith, as Auditor of The Panama Canal, plaintiff in error, and of the United States to make such set-off under authority of Section 1766 of the Revised Statutes, and under authority of the Act of March 3, 1875, (18 Stat., 481), and the general authority of the United States through its officers to set-off any indebtedness due from a creditor against any sum that may be due to such creditor.

Ninth. The said Circuit Court of Appeals erred in not holding that the return made by H. A. A. Smith, Auditor of The Panama Canal, to the petition and amended petition showed such disputed questions of law and fact that ought not to be tried in a proceeding for mandamus, and that the return was sufficient cause for a discharge of the rule and the refusal to issue the writ and in not directing a reversal of the judgment of the court below with directions to dismiss the petition and discharge the rule.

Tenth. Said Circuit Court of Appeals erred in holding that the provision in Section 8 of the Panama Canal Act, approved August 24, 1912, (37 Stat., 560), that the District Judge of the Canal Zone shall be entitled to six weeks' leave of absence each year with pay, did not make unlawful the payment for leave of absence in excess of six weeks in each year, and in holding that a writ of mandamus should issue to this plaintiff in error to cause to be paid the statutory salary of the District Judge, defendant in error, for five days' leave of absence in excess of six weeks' leave of absence in one year.

Eleventh. Said Circuit Court of Appeals erred in holding with the court below and affirming the judgment rendered by the court below that the acts that were required to be performed by H. A. A. Smith, Auditor of the Panama Canal, were merely ministerial and not discretionary.

Wherefore, the said H. A. A. Smith, Auditor of The Panama Canal, plaintiff in error, prays that, for the errors aforesaid and other errors appearing in the record of the said United States Circuit Court of Appeals in the above entitled cause to the prejudice of the plaintiff in error, the said judgment of the said United States Circuit Court of Appeals be reversed, annulled and for naught esteemed, and that said cause be remanded to the District Court of the Canal Zone with instructions to dismiss the petition and discharge the rule granting peremptory mandamus, for the reason that the District Court of the Canal Zone was without jurisdiction to grant the writ as prayed, and for the further reason that the record does not show any sufficient cause for the granting of the writ of mandamus, all to the end that justice may be done in the premises.

(Signed) CHARLES R. WILLIAMS,
Attorney for the Plaintiff in Error.

(Signed) WALTER W. WARWICK,
BENJAMIN F. HARRAH,
Counsel.

Præcipe for Record.

Filed March 3d, 1917.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2997.

Hon. Frank H. Mortimer, Clerk of said Court.

SIR: In making up the transcript of the record in above cause to be filed in the Supreme Court of the United States, please include the following:

(1) Transcript of record (printed).

(2) All subsequent proceedings in above cause in U. S. Circuit Court of Appeals, Fifth Circuit.

Respectfully,

(Signed) CHARLES R. WILLIAMS,
BENJAMIN F. HARRAH,
WALTER W. WARWICK,
Attorneys for Plaintiff in Error.

Clerk's Certificate.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 239 to 261 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, numbered 2997, wherein H. A. A. Smith, Auditor of The Panama Canal, is Plaintiff in Error, and William H. Jackson is Defendant in Error, as full, true and complete as the originals of same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 238 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 5th day of March, A. D. 1917.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States Circuit Court of Appeals before you, or some of you, between H. A. A. Smith, Auditor of the Panama Canal Plaintiff in error versus William H. Jackson defendant in error a manifest error hath happened, to the great damage of the said H. A. A. Smith, Plaintiff in error as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the third day of March, in the year of our Lord one thousand nine hundred and seventeen.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals.

Allowed by
PARDEE,
Circuit Judge.

[Endorsed:] No. 2997. United States Circuit Court of Appeals, Fifth Circuit. H. A. A. Smith, Auditor of the Panama Canal, Plaintiff in Error, vs. William H. Jackson, Defendant in Error. Writ of Error. U. S. Circuit Court of Appeals. Filed Mar. 3, 1917. Frank H. Mortimer, Clerk.

United States Circuit Court of Appeals, Fifth Circuit.

Clerk's Office.

I hereby certify that a true copy of the within Writ has this day been lodged in the Clerk's Office for the use of the Defendant in Error.

Dated this third day of March, A. D. 1916.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER, *Clerk.*

THE UNITED STATES OF AMERICA:

The President of the United States to William H. Jackson, defendant in error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to writ of error sued out and filed in the Clerk's Office of the United States Circuit Court of Appeals for the Fifth Circuit, in the cause wherein H. A. A. Smith, Auditor of the Panama Canal is plaintiff in error versus William H. Jackson defendant in error to show cause, if any there be, why the judgment rendered against the said H. A. A. Smith plaintiff in error and in said cause mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States, this 3d day of March in the year of our Lord one thousand nine hundred and seventeen.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

DON A. PARDEE,
United States Circuit Judge.

[Endorsed:] R. No. 2997. United States Circuit Court of Appeals. Fifth Circuit. H. A. A. Smith, Auditor of the Panama Canal, Plaintiff in Error, vs. William H. Jackson, Defendant in Error. Citation. Original.

I have this day served the within citation on the within-named Wm. H. Jackson, defendant in Error, at Ancon, Canal Zone, by delivering to him a copy of same, attested by Frank H. Mortimer, Clerk, United States Circuit Court of Appeals, Fifth Circuit. This 13th day of March, A. D. 1917.

WM. H. MAY,
Marshal for the District of the Canal Zone,
By JOHN H. POOLE,
Deputy Marshal.

Personally appeared before the undersigned authority, John H. Poole, Deputy Marshal for the District of the Canal Zone, who on oath deposes and says that he is the deputy marshal for the District of the Canal Zone, acting for the Marshal of said District, and that the statements contained in the above and foregoing return are true. This 13th day of March, 1917.

[Seal District Court, Canal Zone.]

E. M. GOOLSBY,
Clerk of the District Court of the Canal Zone.

Endorsed on cover: File No. 25,862. U. S. Circuit Court Appeals, 5th Circuit. Term No. 1032. H. A. A. Smith, auditor of the Panama Canal, plaintiff in error, vs. Wiliam H. Jackson. Filed March 28th, 1917. File No. 25,862.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 457.

H. A. A. SMITH, AUDITOR OF THE PANAMA CANAL,
PLAINTIFF IN ERROR,

vs.

WILLIAM H. JACKSON, DEFENDANT IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MOTION TO ADVANCE.

Now comes the defendant in error, by his attorney, Joseph W. Bailey, and respectfully moves the court to advance this case for hearing at the earliest convenient day of the present term.

The defendant in error, the Honorable William H. Jackson, is the District Judge for the Canal Zone, and as such is

entitled to receive a salary of $6,000 per annum, payable in monthly installments of $500 each. The plaintiff in error, H. A. A. Smith, is the Auditor of the Panama Canal, and as such it is his duty, among other things, to audit, issue, and deliver each month to the defendant in error a warrant, voucher, or pay check for the sum of $500. The plaintiff in error has, however, failed and refused to perform that duty, claiming the right to deduct from the salary of the defendant in error a sum which the said plaintiff in error claims that the defendant in error owes to the Government of the United States. Denying the right of the plaintiff in error to withhold any part of his salary, the defendant in error instituted a mandamus proceeding against the plaintiff in error, and the Honorable Henry D. Clayton, United States Judge for the Middle and Northern Districts of Alabama, was sent to the Canal Zone for the purpose of trying that case. After a full hearing, Judge Clayton decided the case in favor of the defendant in error, and upon appeal to the Circuit Court of Appeals for the Fifth Circuit, the judgment of Judge Clayton was affirmed.

In view of the fact that the case has already been decided in favor of the defendant in error by a United States Judge and by a Circuit Court of Appeals, it would seem to be so simple as not to require an extended consideration; and in view of the fact that it involves the right of a disbursing officer to withhold the salary of a judge, it would seem to present a question which requires a prompt disposition of it.

Respectfully submitted,

JOSEPH W. BAILEY,
Attorney for Defendant in Error.

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In the Supreme Court of the United States.

OCTOBER TERM, 1917.

H. A. A. SMITH, AUDITOR OF THE PANAMA Canal, plaintiff in error,
v.
WILLIAM H. JACKSON, DEFENDANT IN error.
} No. 457.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MANDAMUS.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

The case before this court grew out of a petition for mandamus filed in the District Court of the Canal Zone, by William H. Jackson, the defendant in error, against H. A. A. Smith, auditor of the Panama Canal, plaintiff in error, to compel said plaintiff in error to take such action as would result in the payment to defendant in error, of his statutory salary of six thousand dollars without any deduction for any cause whatsoever.

The material facts are as follows:

William H. Jackson, the defendant in error, was appointed, qualified, and entered on duty as district judge of the Canal Zone May 1, 1914, under section 8 of the Panama Canal act approved August 24, 1912, 37 Stat., 560.

The material part of this section, so far as it affects the right of the defendant in error to the salary of district judge which constitutes the subject matter of the suit now before this court, is as follows:

> SEC. 8. That there shall be in the Canal Zone one district court with two divisions one including Balboa and the other including Cristobal; and one district judge of the said district who shall hold his court in both divisions at such time as he may designate by order, at least once a month in each division.
>
> * * * * * *
>
> The district judge, the district attorney, and the marshal shall be appointed by the President, by and with the advice and consent of the Senate, for terms of four years each, and until their successors are appointed and qualified, and during their terms of office shall reside within the Canal Zone, and shall hold no other office nor serve on any official board or commission nor receive any emoluments except their salaries. The district judge shall receive the same salary paid the district judges of the United States, and shall appoint the clerk of said court, and may appoint one assistant when necessary, who

shall receive salaries to be fixed by the President. The district judge shall be entitled to six weeks' leave of absence each year with pay.

William H. Jackson, the defendant in error, held the office of judge of the District Court of the Canal Zone from May 1, 1914, until the filing of the petition for mandamus and continues to hold said office.

During the period from May 1, 1915, to May 1, 1916, William H. Jackson was absent from the Canal Zone for a period of 47 days, being five days in excess of six weeks for this period (Record, 45, 60, 61, 134, 135, 142, 156, 158, 189 to 196).

The United States, acting through the Panama Canal, furnished William H. Jackson, the defendant in error, house No. 118, Ancon, Canal Zone, during the period from May 1, 1914, to October 17, 1914, and the said William H. Jackson occupied and used said house during said period without paying any rent therefor. The United States also supplied said house with electric current.

The United States, acting through the Panama Canal, furnished William H. Jackson, the defendant in error, house No. 311 (old No. 155), Ancon, Canal Zone, for the period from December, 1914, to May, 1916, inclusive, and supplied electric current for same. The said William H. Jackson, the defendant in error, occupied and used said house and the electric current therefor without the payment of any sum whatever for said house or the electric current therefor.

The reasonable value of the rent of said houses and of the electric current furnished was $1,048.43 (see

Record, pages 15, 17, 18, 141, and 149). It was always understood that William H. Jackson should pay rent for said houses if legally liable therefor (Record, 145, 146).

William H. Jackson, the defendant in error, claimed that he was illegally discriminated against and that he was not legally liable to pay rent at a time when officers and employees of the Panama Canal, whose compensation was fixed and whose appointment was made under authority of section 4 of the Panama Canal act, were not required to pay rent (Record, 141). During the period for which deductions from salary for rent were made the officers and employees of the Panama Canal were not required to pay rent or for electric current.

H. A. A. Smith, auditor for the Panama Canal, plaintiff in error, was appointed auditor of the Panama Canal by the governor of the Panama Canal, acting under authority of the President pursuant to the provisions of section 4 of the Panama Canal act. This section provides among other things that:

> SEC. 4. That when in the judgment of the President the construction of the Panama Canal shall be sufficiently advanced toward completion to render the further services of the Isthmian Canal Commission unnecessary the President is authorized by Executive order to discontinue the Isthmian Canal Commission, which, together with the present organization shall then cease to exist; and the President is authorized thereafter to complete, govern, and operate the Panama Canal and

govern the Canal Zone, or cause them to be completed, governed, and operated, through a governor of the Panama Canal and such other persons as he may deem competent to discharge the various duties connected with the completion, care, maintenance, sanitation, operation, government, and protection of the canal and Canal Zone.

* * * * *

The governor of the Panama Canal shall be appointed by the President, by and with the advice and consent of the Senate, commissioned for a term of four years, and until his successor shall be appointed and qualified. He shall receive a salary of ten thousand dollars a year. All other persons necessary for the completion, care, management, maintenance, sanitation, government, operation, and protection of the Panama Canal and Canal Zone shall be appointed by the President or by his authority, removable at his pleasure.

On January 27, 1914, the President, by virtue of authority conferred upon him by section 4 of the Panama Canal act quoted above, issued an Executive order—

To establish a permanent organization for the Panama Canal.

The pertinent part of this Executive order, paragraph 5 of section 1, referred to in the Record as section 6, reads as follows:

There shall be an accounting department under the supervision and direction of the auditor, with an assistant in the United

States. The duties of the department shall include all general bookkeeping, auditing and accounting, both for money and property, cost keeping, the examination of pay rolls and vouchers, the inspection of time books and of money and property accounts, the preparation of statistical data, and the administrative examination of such accounts as are required to be submitted to the United States Treasury Department; and the collection, custody, and disbursement of funds for the Panama Canal, and the Canal Zone.

These same duties shall be performed for the Panama Railroad Company on the Isthmus when not inconsistent with the charter and by-laws of that company. The department shall be charged with the handling of claims for compensation on account of personal injuries and of claims for damages to vessels. Within the limits fixed by law, the duties and financial responsibilities of the officers and employees charged with the receipt, custody, disbursement, auditing and accounting for funds and property shall be prescribed in regulations issued by the governor, with the approval of the President. The auditor shall maintain such a system of bookkeeping as will enable him to furnish at any time full, complete, and correct information in regard to the status of appropriations made by Congress, the status of all other funds, and the amounts of net profits on all operations, which are to be covered into the Treasury as required by the Panama Canal act. (Record, 76.)

The act of October 22, 1913, 38 Stat., 209, provides that:

> The money accounts of the Panama Canal, under the Panama Canal act of August twenty-fourth, nineteen hundred and twelve (Statutes at Large, volume thirty-seven, page five hundred and sixty), shall continue to be audited by the Auditor for the War Department.

The auditor of the Panama Canal created by the President by the Executive order above quoted is an administrative auditor, having supervision and direction of the accounting department of the Panama Canal and a part of his duty is to examine claims and recommend them to the governor for approval. (Record, 159.) He is also charged with the duty of seeing that collections are made in proper cases. H. A. A. Smith, auditor of the Panama Canal, refused to recommend for approval and payment an amount of the salary of William H. Jackson, defendant in error, as judge of the District Court of the Canal Zone, equal to $1,048.43, because of a claimed indebtedness due from the said William H. Jackson for house rent and electric current furnished to him by the United States, as shown above. (Record, 9, 44, 60.)

H. A. A. Smith, auditor for the Panama Canal, also refused to recommend for approval and payment $83.33 of the salary claimed by the said William H. Jackson, because it had not been earned by reason of the fact that the said William H. Jackson

had been absent from the Isthmus five days in excess of six weeks during the period from May 1, 1915, to April 30, 1916, inclusive (Record, 9, 44, 60.)

These refusals of the said H. A. A. Smith, auditor of the Panama Canal, to recommend for approval and payment the amount of the salary above specified were in accordance with the decisions of the Comptroller of the Treasury rendered after request made under the act of July 31, 1894, 28 Stat., 208, which provides as follows:

> Disbursing officers, or the head of any executive department, or other establishment not under any of the executive departments, may apply for and the Comptroller of the Treasury shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the auditor and the Comptroller of the Treasury in passing upon the account containing said disbursement. (Record, 13, 14, 45, 61.)

The said William H. Jackson, defendant in error, charged in his petition, amended petition, and amendment and supplement to the amended petition, that it was the duty of H. A. A. Smith, auditor of the Panama Canal, to audit, issue, and deliver to him the warrant, vouchers, and pay checks for the sums claimed to be due as salary, and prayed for a peremptory writ of mandamus to issue, directed to the said H. A. A. Smith, auditor of the Panama Canal, commanding him as such auditor of the Panama

Canal to audit, issue, and deliver unto him the warrant, vouchers, or pay checks in the said amounts, and to do and perform such other acts and things in the premises as may be necessary and proper for the relief prayed for. (Record, 2, 37, 56.)

The plaintiff in error filed answers to the original petition, the amendment to the original petition, and to the amendment and supplement to the amended petition, setting up the facts as above set forth and denying that under the law and the facts the petitioner was entitled to a mandamus against him, and praying to be discharged from further answer. (Record, 9 to 36 inclusive, 44 to 48 inclusive, and 60 to 62 inclusive.)

The defendant in error, June 5, 1916, filed a reply to the answers of plaintiff in error. (Record, 48.) The plaintiff in error specifically demurred to this reply of the defendant in error on the ground that the laws of the Canal Zone and of the United States of America make no provision for such a pleading. (Record, 62.)

On account of the disqualification of the defendant in error to sit in said cause, the Honorable H. D. Clayton, United States district judge for the middle and northern district of Alabama, was appointed by the President to perform the duties of district judge of the Canal Zone in this case. (Record, 63.)

The cause was heard by Judge Clayton without a jury and on July 11, 1916, he rendered an opinion and judgment granting a peremptory writ of man-

damus. (For opinion see record, p. 66 to 126, inclusive.) The peremptory writ of mandamus issued was in words and figures as follows:

WRIT OF MANDAMUS.

United States of America, Panama Canal.

In the District Court of the Canal Zone: Balboa Division.

William H. Jackson, relator, *v.* H. A. A. Smith, auditor of the Panama Canal, respondent. No. 107 civil.

To the Auditor of the Panama Canal,

H. A. A. Smith, Auditor of the Panama Canal:

Greeting.—This cause coming on to be heard by the court, and without a jury by agreement of the parties, upon the petition for writ of mandamus, the amended petition for writ of mandamus, the answer of the respondent, the reply of the relator, the amended and supplemental petition for writ of mandamus, and the answer of the respondent thereto; and after argument of counsel and the court being fully advised in the premises it is considered, ordered, and adjudged by the court, that the respondent, the auditor of the Panama Canal, has unlawfully withheld from the salary due to the relator as judge of the District Court of the Canal Zone, the following sums:

For the month of December, 1914	$170.07
For the month of January, 1916	66.66
For the month of March, 1916	500.00
For the month of April, 1916	341.97
For the month of May, 1916	53.06

It is further considered, ordered, and adjudged by the court that the total sum, $1,131.76, above mentioned, is a part of the salary due to the relator as judge of the District Court of the Canal Zone, hitherto appropriated under an act of Congress, and that the relator is entitled to receive and be paid the full sum of the annual stipend appropriated by the Congress as aforesaid, in monthly installments of $500, and that it was the legal duty of the auditor of the Panama Canal, the respondent herein, to issue, audit, and deliver to the relator the warrant, voucher, or pay check for the payment of the salary and the above amount due to the relator, and to cause the said warrant, voucher, or pay check to be paid by the paymaster of the Panama Canal to the relator, and to do and perform any and all other acts and things by law required of the said auditor of the Panama Canal, the respondent herein, in the performance of this ministerial duty, to the end that the said William H. Jackson, judge of the District Court of the Canal Zone, the relator herein, may receive and be paid the salary and the above amount to which he is legally entitled by reason of his office and the appropriation made by the Congress for the payment of the same.

And it is further considered, ordered, and adjudged by the court that the funds appropriated by the Congress for the payment of the salary of the relator herein are now in the custody or under the control of the auditor of the Panama Canal, the respondent herein,

and that the said auditor of the Panama Canal, the respondent, is charged with the duty of disbursing said funds in the manner required by law, and that the said auditor of the Panama Canal, the respondent, has neglected, failed, and refused to perform his ministerial duty enjoined by law; and it is further considered, ordered, and adjudged by the court, being of the opinion that the relator is entitled to the relief prayed for in his petition, and therefore you, the said auditor of the Panama Canal, the respondent herein, are hereby commanded and enjoined that immediately upon the receipt of this writ and without delay you audit, issue, and deliver to the said William H. Jackson, as the judge of the District Court of the Canal Zone, the relator herein, the warrant, voucher, or pay check for the sum of $1,131.76, unlawfully withheld by the auditor of the Panama Canal, the respondent herein, from the salary due to this relator, and to cause the same to be paid out of the funds appropriated by the Congress as aforesaid; and it is further considered, ordered, and adjudged that you certify perfect obedience and due compliance with this judgment and mandate to this court at its session to be held at the hour of 10 o'clock in the forenoon of Tuesday, the 18th day of July, A. D. 1916. And it is further ordered that the relator recover his costs in this behalf.

Herein fail not.

Witness the Honorable Henry D. Claxton, United States district judge for the Middle and Northern Districts of Alabama, presiding

in the District Court of the Canal Zone by designation of the President under the act of Congress approved August 24, 1912, this 11th day of July, A. D. 1916.

(Signed) H. D. CLAYTON,
United States District Judge.

(Record 126, 127, and 128.)

The plaintiff in error excepted to the judgment and took the cause to the United States Circuit Court of Appeals for the Fifth Circuit by writ of error under the provisions of section 9 of the Panama Canal act approved August 24, 1912, 37 Stat., 560, which provides that:

> The Circuit Court of Appeals of the Fifth Circuit of the United States shall have jurisdiction to review, revise, modify, reverse, or affirm the final judgments and decrees of the district court of the Canal Zone and to render such judgments as in the opinion of the said appellate court should have been rendered by the trial court in all actions and proceedings in which the Constitution, or any statute, treaty, title, right, or privilege of the United States is involved and a right thereunder denied, and in cases in which the value in controversy exceeds one thousand dollars, to be ascertained by the oath of either party, or by other competent evidence, and also in criminal causes wherein the offense charged is punishable as a felony. And such appellate jurisdiction, subject to the right of review by or appeal to the Supreme Court of the United States as in other cases authorized by law, may be exercised by said

circuit court of appeals in the same manner, under the same regulations, and by the same procedure as nearly as practicable as is done in reviewing the final judgments and decrees of the district courts of the United States.

The errors assigned in the District Court of the Canal Zone were as follows:

> Now comes the above-named respondent, H. A. A. Smith, the plaintiff in error, by his counsel, Charles R. Williams, and says that in the record and proceedings in the above-entitled cause there is manifest error in this, to-wit:
>
> First. That the trial court erred in overruling the respondent's demurrer and oral motion to strike relator's replication.
>
> Second. That the trial court erred in overruling and refusing to grant respondent's motion, made at the close of the testimony and before argument upon the case, to dismiss relator's petition for mandamus, on the ground that the admitted and uncontroverted facts showed that relator was not entitled to the mandamus as against this respondent; because the Auditor of the Treasury Department of the United States, known as the Auditor for the War Department, is and was the legal auditor for The Panama Canal.
>
> Third. That by said record it appears that judgment was given for the said relator, when judgment should have been given in favor of said respondent and against said relator.
>
> Wherefore the said H. A. A. Smith, respondent and plaintiff in error, prays that the judgment of the court be in all things reversed."

The proceedings in the Circuit Court of Appeals for the Fifth Circuit are shown on pages 239 to 249, inclusive, of the record.

The opinion of the Circuit Court of Appeals was as follows:

> By the court:
>
> The elaborate opinion of Judge Clayton covers the entire case and fully justifies the judgment rendered.
>
> We find none of the assignments of error well taken.
>
> Judgment affirmed.

The opinion of Henry D. Clayton, district judge, Middle and Northern District of Alabama, presiding, which was adopted by the Circuit Court of Appeals, is set out in full in the record, pages 66 to 126, inclusive.

The judgment was as follows:

> This cause came on to be heard on the transcript of the record from the District Court of the Canal Zone, and was argued by counsel.
>
> On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

The case was brought to this court by writ of error upon an assignment of errors filed in the United States Circuit Court of Appeals, Fifth Circuit, March 3, 1917, as follows:

> Assignment of errors on writ of error from the Supreme Court of the United States to the Circuit Court of Appeals.

Now comes the plaintiff in error, H. A. A. Smith, auditor of the Panama Canal, by his attorney, and says that, in the record and proceedings aforesaid of the United States Circuit Court of Appeals for the Fifth Circuit, in the above-entitled cause and in rendition of the final judgment therein, manifest error has intervened to the prejudice of said plaintiff in error in this, to wit:

First. Said Circuit Court of Appeals erred in entering judgment affirming the judgment of the District Court of the Canal Zone awarding a peremptory writ of mandamus directing and commanding H. A. A. Smith, auditor of the Panama Canal, the respondent, "to audit, issue, and deliver to the said William H. Jackson, as judge of the District Court of the Canal Zone, the relator herein, the warrant, voucher, or pay check for the sum of eleven hundred thirty-one dollars and seventy-six cents unlawfully withheld by the auditor of the Panama Canal, the respondent herein, from the salary due this relator and to cause the same to be paid out of the funds appropriated by Congress."

Second. Said Circuit Court of Appeals erred in not reversing the judgment of the District Court of the Canal Zone aforesaid and ordering the said District Court to dismiss the petition of the defendant in error for want of jurisdiction in the said court to proceed in the premises.

Third. Said Circuit Court of Appeals erred in holding that under the local laws of the Canal Zone the District Court of the Canal

Zone had jurisdiction to issue the writ of mandamus to control the official action of H. A. A. Smith, auditor of the Panama Canal, a ministerial officer of the United States in the Canal Zone.

Fourth. Said Circuit Court of Appeals erred in not holding that the use of the writ of mandamus to control the official action of H. A. A. Smith, auditor of the Panama Canal, a ministerial officer of the United States in the Canal Zone, was an exercise of the judicial power of the United States under Article III, Section 1, of the Constitution of the United States, and that such power had not been and could not be imparted to the District Court of the Canal Zone.

Fifth. Said Circuit Court of Appeals erred in not holding that this was in effect a suit against the United States and that, as it had not consented to the act sought to be enforced by the writ, it was a necessary party and, as there was no law by which the United States could be made a party, the court was without jurisdiction and should have dismissed the petition.

Sixth. Said Circuit Court of Appeals erred in holding that H. A. A. Smith, auditor of the Panama Canal, was a final auditor, and in not holding that the decision of the Comptroller of the Treasury rendered upon the request of the governor of the Panama Canal under section 8 of the act of July 31, 1894, that said payments in question were not authorized, was final and binding upon all executive officers of the Panama Canal, and that H. A. A. Smith, auditor of the Panama Canal, plaintiff

in error, one of the executive officers of the Panama Canal, had no right to allow the claim of William H. Jackson, the defendant in error, after such decision had been rendered, and that this decision was a complete defense to the petition for mandamus.

Seventh. Said Circuit Court of Appeals erred in not holding that the accounts of the Panama Canal must be audited by the Auditor for the War Department under the act of October 22, 1918, 38 Stat. 209, and that the balances certified by the Auditor for the War Department on such accounts, subject to the right of revision by the Comptroller of the Treasury, were final and conclusive under section 8 of the act of July 31, 1894, 28 Stat. 207, upon all of the executive officers of the Panama Canal, including H. A. A. Smith, auditor of the Panama Canal, the plaintiff in error, and that the action of H. A. A. Smith, auditor of the Panama Canal, was not final and conclusive upon the claim of William H. Jackson, defendant in error, and that it was not a necessary action to be taken before the said William H. Jackson, the defendant in error, could present his claim to the Auditor for the War Department for action of that officer thereon.

Eighth. The said Circuit Court of Appeals erred in adopting the opinion of Judge Clayton, sitting as district judge of the Canal Zone in this case, finding that William H. Jackson, the plaintiff in error, was not indebted to the United States in any sum and that the auditor of the Panama Canal was not authorized to

recommend the withholding of any sum from the salary of William H. Jackson for the reason that such finding and judgment rendered thereon by the court below could not be made without making the United States a party to the action, and, as the United States was not a party and could not be made a party, the finding and judgment thereon by the District Court of the Canal Zone adopted by the said Circuit Court of Appeals was unauthorized and amounted to a denial by said Circuit Court of Appeals of the rights and privileges of H. A. A. Smith, as auditor of the Panama Canal, plaintiff in error, and of the United States to make such set-off under authority of section 1766 of the Revised Statutes, and under authority of the act of March 3, 1875, 18 Stat. 481, and the general authority of the United States through its officers to set-off any indebtedness due from a creditor against any sum that may be due to such creditor.

Ninth. The said Circuit Court of Appeals erred in not holding that the return made by H. A. A. Smith, auditor of the Panama Canal, to the petition and amended petition showed such disputed questions of law and fact that ought not to be tried in a proceeding for mandamus, and that the return was sufficient cause for a discharge of the rule and the refusal to issue the writ and in not directing a reversal of the judgment of the court below with directions to dismiss the petition and discharge the rule.

Tenth. Said Circuit Court of Appeals erred in holding that the provision in section 8 of the

Panama Canal act, approved August 24, 1912, 37 Stat. 560, that the district judge of the Canal Zone shall be entitled to six weeks' leave of absence each year with pay, did not make unlawful the payment for leave of absence in excess of six weeks in each year, and in holding that a writ of mandamus should issue to this plaintiff in error to cause to be paid the statutory salary of the district judge, defendant in error, for five days' leave of absence in excess of six weeks' leave of absence in one year.

Eleventh. Said Circuit Court of Appeals erred in holding with the court below and affirming the judgment rendered by the court below that the acts that were required to be performed by H. A. A. Smith, auditor of the Panama Canal, were merely ministerial and not discretionary.

Wherefore, the said H. A. A. Smith, auditor of the Panama Canal, plaintiff in error, prays that, for the errors aforesaid and other errors appearing in the record of the said United States Circuit Court of Appeals in the above-entitled cause to the prejudice of the plaintiff in error, the said judgment of the said United States Circuit Court of Appeals be reversed, annulled, and for naught esteemed, and that said cause be remanded to the District Court of the Canal Zone with instructions to dismiss the petition and discharge the rule granting peremptory mandamus, for the reason that the District Court of the Canal Zone was without jurisdiction to grant the writ as prayed, and for the further reason that the

record does not show any sufficient cause for the granting of the writ of mandamus, all to the end that justice may be done in the premises.

Each and every one of the errors assigned is insisted upon as sufficient ground for a reversal of the judgment of the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF OF ARGUMENT.

I. The District Court of the Canal Zone was without jurisdiction in this case and the Circuit Court of Appeals erred in not reversing the judgment for this reason.

(*a*) The District Court of the Canal Zone was without jurisdiction to issue a mandamus commanding H. A. A. Smith, auditor of the Panama Canal, to cause to be paid any sum whatever to William H. Jackson, the defendant in error, out of funds appropriated by Congress, and the Circuit Court of Appeals erred in affirming this judgment.

(*b*) This is, in effect, a suit against the United States and the United States has not consented to be sued in the District Court of the Canal Zone to recover fees, salary, or compensation for official services of officers of the United States.

(*c*) Mandamus as provided for in the Code of Civil Procedure of the Canal Zone is an original action brought for the purpose of securing relief by the writ and the merits would be triable in such a proceeding. The court has no power to issue the writ except in cases where it has jurisdiction of the necessary parties to a suit on the merits.

(*d*) The control of the ministerial officers and agents of the United States in the Canal Zone by the writ of mandamus is an exercise of the judicial power of the United States under Article III, Section 1, of the Constitution, and no part of this judicial power has been or can be conferred upon the District Court of the Canal Zone.

II. There is no law conferring authority upon the plaintiff in error finally to allow or disallow any claim or demand upon the United States, such authority being given by law only to the accounting officers of the Treasury, and any action to be taken by the plaintiff in error in the approval or disapproval of a payment on a pay roll, pay check, or voucher was subject to review and reversal by the Auditor for the War Department and the Comptroller of the Treasury and it was, moreover, discretionary.

III. The plaintiff in error had no authority to approve a payment to the defendant in error which the Comptroller of the Treasury had decided was not a legal claim against the Government.

IV. The money in the hands of the disbursing officer of the Panama Canal was money in the Treasury of the United States, and the court had no power to order its withdrawal therefrom.

V. Under the law which provides that the district judge of the Canal Zone shall be entitled to six weeks' leave of absence each year with pay there is no authority of law for the payment of salary for leave of absence taken in excess of six weeks in one year

ARGUMENT.

I.

(a) The District Court of the Canal Zone was without jurisdiction to issue a mandamus commanding H. A. A. Smith, auditor of the Panama Canal, plaintiff in error, to cause to be paid any sum whatever to William H. Jackson, defendant in error, out of funds appropriated by Congress, and the Circuit Court of Appeals erred in affirming this judgment.

It was not the duty of H. A. A. Smith, auditor of the Panama Canal, plaintiff in error, to make any payment to William H. Jackson, defendant in error, but of the paymaster of the Panama Canal and the District Court of the Canal Zone was without jurisdiction to command H. A. A. Smith, auditor of the Panama Canal, plaintiff in error, to *cause to be paid* a sum of money, which, if payable at all, it was the duty of the paymaster of the Panama Canal to pay, out of moneys of the United States advanced to him by the Treasury Department under an appropriation made by Congress and for which the paymaster of the Panama Canal was required to account to the United States, through the Treasury Department, and not to H. A. A. Smith, auditor of the Panama Canal, the plaintiff in error. (Record 3, 38, 150, 154, 159, and 162.)

In paragraph 4 of the original petition of the defendant in error, he alleges that it was the duty of H. A. A. Smith, auditor of the Panama Canal, "to approve and audit the said warrant, voucher, or pay

check in such form and manner that your petitioner may collect and receive the cash thereon from the paymaster of the Panama Canal from the funds appropriated by Congress as aforesaid." (Record pp. 3, 38.) The evidence shows that the paymaster is one of the three divisions of the accounting department. It also shows that, if the paymaster declines to make a payment, the auditor can not force him to do so. He is not obliged to make any payment approved by the auditor. (Record p. 150.)

The paymaster forwards all his accounts and vouchers to the Auditor for the War Department for settlement. (Record p. 158.)

The money to pay the salary of the defendant in error was appropriated in the acts making appropriations for the sundry civil expenses for the years respectively in which the services were performed and is appropriated out of money in the Treasury not otherwise appropriated.

Section 3591 of the Revised Statutes defines what the Treasury is, as follows:

> The rooms provided in the Treasury Building at the seat of Government for the use of the Treasurer of the United States, his assistants and clerks, and occupied by them, and the fireproof vaults and safes erected therein for the keeping of the public moneys in the possession and under the immediate control of the Treasurer, and such other apartments as are provided as places of deposit of the public money, shall be the Treasury of the United States.

Section 301 of the Revised Statutes provides for a Treasurer of the United States, as follows:

> There shall be in the Department of the Treasury a Treasurer of the United States, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be entitled to a salary of six thousand five hundred dollars a year.

Section 305 of the Revised Statutes, as amended by section 11 of the act of July 31, 1894, 28 Stat. 209, provides in part that—

> The Treasurer shall receive and keep the moneys of the United States and disburse the same upon warrants drawn by the Secretary of the Treasury, countersigned by the comptroller, * * *.

Section 3614 of the Revised Statutes provides.

> Whenever it becomes necessary for the head of any department or office to employ special agents, other than officers of the Army or Navy, who may be charged with the disbursement of public moneys, such agents shall, before entering upon duty, give bond in such form and with such security as the head of the department or office employing them may approve.

Section 3622 of the Revised Statutes provides in part that—

> Every officer or agent of the United States who receives public money which he is not authorized to retain as salary, pay, or emolument shall render his accounts monthly. Such ac-

counts, with the vouchers necessary to the correct and prompt settlement thereof, shall be sent by mail or otherwise to the bureau to which they pertain within ten days after the expiration of each successive month, and, after examination there, shall be passed to the proper accounting officer of the Treasury for settlement.

Section 3623 of the Revised Statutes provides:

> All officers, agents, or other persons receiving public moneys shall render distinct accounts of the application thereof according to the appropriation under which the same may have been advanced to them.

Section 3648 of the Revised Statutes provides in part that—

> No advance of public money shall be made in any case whatever. * * * It shall, however, be lawful, under the special direction of the President, to make such advances to the disbursing officers of the Government as may be necessary to the faithful and prompt discharge of their respective duties and to the fulfillment of the public engagements. * * *

Section 10 of the act of July 31, 1894, 28 Stat. 208, established the division of bookkeeping and warrants to be under the direction of the Secretary of the Treasury, and provides that:

> Upon the books of this division shall be kept all accounts of receipts and expenditures of public money except those relating to the postal revenues and expenditures therefrom. * * *

Sections 11 and 12 of this act provide for the action that shall be taken on requisitions for advances of money, the time when accounts shall be transmitted to administrative officers, when such accounts shall be received by auditors, and how a delinquency shall affect a requisition for an advance.

These provisions of law are pertinent as showing that the money to pay the salary of the defendant in error must have been advanced to the paymaster of the Panama Canal as a disbursing officer and that he was personally accountable to the United States for such money advanced to him and not to the auditor of the Panama Canal.

Section 236 of the Revised Statutes provides:

> All claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the Department of the Treasury.

Section 7 of the act of July 31, 1894, 28 Stat. 206, creates six auditors for the examination and settlement of accounts. Section 8 of this act provides in part as follows:

> The balances which may from time to time be certified by the auditors to the division of bookkeeping and warrants, or to the Postmaster General, upon the settlements of public accounts, shall be final and conclusive upon the executive branch of the Government, except that any person whose accounts may have been settled, the head of the executive

department, or of the board, commission, or establishment not under the jurisdiction of an executive department, to which the account pertains, or the Comptroller of the Treasury, may, within a year, obtain a revision of the said account by the Comptroller of the Treasury, whose decision upon such revision shall be final and conclusive upon the executive branch of the Government: *Provided*, That the Secretary of the Treasury may, when in his judgment the interests of the Government require it, suspend payment and direct the reexamination of any account.

* * * * *

Disbursing officers, or the head of any executive department, or other establishment not under any of the executive departments, may apply for and the Comptroller of the Treasury shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the auditor and the Comptroller of the Treasury in passing upon the account containing said disbursement.

The act of February 3, 1905, 33 Stat. 647, provides that—

> Hereafter the accounts for the Isthmian Canal Commission shall be audited by the Auditor for the War Department.

The act of October 22, 1913, 38 Stat. 209, quoted in the statement of facts, page 1 of this brief, provides that the Auditor for the War Department shall continue to audit the money accounts of the Panama Canal.

The auditor of the Panama Canal is neither a disbursing officer nor a final auditor. He could not be made a final auditor by the President under any power conferred upon him by the Panama Canal act.

The act of October 22, 1913, 38 Stat. 209, quoted above, is a special statute and forms an exception to any general provision in the Panama Canal act. *Townsend* v. *Little*, 109 U. S. 504, 512; *United States* v. *Nix*, 189 U. S. 199, 205.

In the first case cited Mr. Justice Woods, speaking for the court, said (p. 512):

> According to the well-settled rule, that general and specific provisions, in apparent contradiction, whether in the same or different statutes, and without regard to priority of enactment, may subsist together, the specific qualifying and supplying exceptions to the general, this provision for the execution of a particular class of deeds is not controlled by the law of the Territory requiring deeds generally to be executed with two witnesses.

In the second case cited above, Mr. Justice Brown, speaking for the court, said (p. 205):

> The rule of statutory construction is well settled that a general act is not to be construed as applying to cases covered by a prior special act upon the same subject. On this principle we held in *Townsend* v. *Little*, 109 U. S. 504, that special and general statutory provisions may subsist together, the former qualifying the latter. See also *Churchill* v. *Crease*, 5 Bing. 177; *Magone* v. *King*, 51 Fed. Rep. 525, and cases cited; *State* v. *Clarke*, 25 N. J. Law, 54.

Manifestly the President had no authority under the Panama Canal act to create by Executive order a final auditor for Panama Canal accounts and to wipe out so far as that service is concerned the provisions of law quoted above. He could not create an entirely independent system of accounting for the Panama Canal. The Executive order quoted from and relied upon by the District Court of the Canal Zone and the Circuit Court of Appeals must be read in connection with and as subordinate to the specific provisions of law quoted above. When so read it is clear that it provides for an administrative audit only.

The plaintiff in error could not be made a disbursing officer by Executive order, but only by complying with the provisions of section 3614 of the Revised Statutes and having advances made to him as provided in section 3648 of the Revised Statutes. There is no proof or even claim in any part of this record that he was ever appointed a disbursing officer or gave bond as required by section 3614 of the Revised Statutes. Neither is there any claim or pretentions that a dollar was ever advanced to him as a disbursing officer in accordance with the provisions of section 3648 of the Revised Statutes. All funds for the payment of the defendant in error were advanced to the paymaster of the Panama Canal. It was understood in the pleadings that the money to be paid was in the hands of the paymaster and that it had been advanced to him as paymaster and disbursing officer within the meaning of sections

3614 and 3648 of the Revised Statutes. He was therefore personally accountable for it, as provided for in the sections of the Revised Statutes and the acts cited and quoted from above.

The auditor of the Panama Canal was not a final auditor as to these moneys and could not give the paymaster credit for a single disbursement that he might make from them. It was therefore beyond the jurisdiction of the District Court of the Canal Zone to issue the writ of mandamus against H. A. A. Smith, auditor of the Panama Canal, plaintiff in error, commanding him to cause any sum to be paid to the plaintiff in error. *Ex parte Rowland*, 104 U. S. 604, 617. In this case the court said (p. 617):

> The general principle which governs proceedings by *mandamus* is, that whatever can be done without the employment of that extraordinary remedy, may not be done with it. It only lies when there is practically no other remedy. As a necessary consequence the writ must issue directly against him whose duty it is to do the thing which the parties seek to have done; for, as was said in *Reg.* v. *Mayor of Derby*, 2 Salk. 436, "it is absurd that the writ should be directed to one person to command another." The question here is, whether it was the duty of the tax collector under the law to collect the special tax which the commissioners had levied. That question the creditor could have had determined in a direct proceeding against the collector, without the help of the commissioners. It follows, that if the command of the writ against the

commissioners was what the Circuit Court has construed it to be, it was in excess of the jurisdiction of the court, and consequently void. If the command of the writ was in excess of jurisdiction, so necessarily were the proceedings for contempt in not obeying.

The District Court of the Canal Zone exceeded its jurisdiction in entering judgment awarding the writ of mandamus commanding the plaintiff in error *to cause the sum of $1,131.76 to be paid* to the defendant in error, and the Circuit Court of Appeals erred in affirming this judgment. The judgment of the Circuit Court of Appeals should be reversed for the first error assigned.

(b) This is in effect a suit against the United States, and the United States has not consented to be sued in the District Court of the Canal Zone to recover fees, salary, or compensation for official services of officers of the United States.

The pleadings in this case raise the question of the right of the defendant in error to use and occupy the property of the United States without making compensation therefor; the question whether, if he did use and occupy such property, he became indebted to the United States by reason thereof; and also, in the event of any liability being established, whether the amount of the claim therefor can be set-off against any salary otherwise due him.

These issues can not be disposed of without affecting the use of property of the United States or bringing in question the right of the United States

to set-off a debt claimed to be due to the Government against an amount due from it. The United States was the real party in interest and the one that would be affected by any judgment that could be rendered by the District Court of the Canal Zone on these issues, unless it can be held as a conclusion of law that no indebtedness due from the district judge of the Canal Zone to the United States could be set-off against him in an action brought by him against the United States to recover his statutory salary.

The right to make deductions of amounts due from employees of the Isthmian Canal Commission was specifically given by section 8 of the act of March 4, 1907, 34 Stat. 1371. This section provides that:

> All amounts due from employees, whether to the Commission, Panama Railroad Company, or contractor, for transportation, board, supplies, or for any other service, are hereby authorized to be deducted from the compensation otherwise payable to the said employees, and to be paid to the authorized parties, or to be credited to the appropriation out of which the transportation, board, supplies, or other service was originally paid.

This section has never been specifically repealed and the Panama Canal act of August 24, 1912, 37 Stat. 560, is not in conflict with it. It is therefore still being enforced as applicable to the Panama Canal.

If William H. Jackson, the defendant in error, should be considered as an employee of the Panama

Canal within the meaning of this statute, any amount due from him to the Panama Canal or the United States could be deducted from compensation to be paid to him. A sum due from him would, therefore, under such assumption, constitute a proper set-off in a suit by the said William H. Jackson for salary or compensation when brought directly against the United States.

The question as to the amount or validity of such set-off could not be decided without affecting the rights of the United States. This would make the United States a necessary party. *Marlow* v. *Hinde*, 12 Wheat. 193; *California* v. *Southern P. Co.*, 157 U. S. 229.

The effect of the judgment rendered or which could be rendered determines whether the United States is a necessary party. *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387; *Oregon* v. *Hitchcock*, 202 U. S. 60, 61; *Louisiana* v. *McAdoo*, 234 U. S. 627.

But there is some question as to whether William H. Jackson, district judge of the Canal Zone, defendant in error, is an employee of the Panama Canal within the meaning of the act of March 4, 1907, *supra*. If he is not, then section 1766 of the Revised Statutes, and the act of March 3, 1875, 18 Stat. 481, would give the right to set-off. This section and act provide respectively, that:

> Sec. 1766. No money shall be paid to any person for his compensation who is in arrears to the United States, until he has accounted for and paid into the Treasury all sums for

which he may be liable. In all cases where the pay or salary of any person is withheld in pursuance of this section, the accounting officers of the Treasury, if required to do so by the party, his agent or attorney, shall report forthwith to the solicitor of the Treasury the balance due; and the solicitor shall, within sixty days thereafter, order suit to be commenced against such delinquent and his sureties.

Act of March 3, 1875:

"That when any final judgment recovered against the United States or other claim duly allowed by legal authority shall be presented to the Secretary of the Treasury for payment and the plaintiff or claimant therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Secretary to withhold payment of an amount of such judgment or claim equal to the debt thus due to the United States; and if such plaintiff or claimant assents to such set-off and discharges his judgment or an amount thereof equal to said debt or claim, the Secretary shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff or claimant denies his indebtedness to the United States or refuses to consent to the set-off, then the Secretary shall withhold payment of such further amount of such judgment or claim as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if

> such debt is not already in suit, it shall be the duty of the Secretary to cause legal proceedings to be immediately commenced to enforce the same and to cause the same to be prosecuted to final judgment with all reasonable dispatch. And if in such action judgment shall be rendered against the United States or the amount recovered for debt and costs shall be less than the amount so withheld, as before provided, the balance shall then be paid over to such plaintiff by such Secretary with six per cent interest thereon for the time it has been withheld from the plaintiff."

Where the right to set-off exists, the right to withhold is a necessary corollary. *Barry* v. *United States*, 229 U. S. 47, 53.

The said William H. Jackson, the defendant in error, denied in his original petition that he was indebted to the Panama Canal or to the United States. (Record p. 5.) The plaintiff in error set up the indebtedness of the defendant in error to the Panama Canal and the United States in his answer. (Record pp. 10 to 15, inclusive.) The defendant in error denied in his amended petition (Record, p. 37) that he was indebted to the Panama Canal or to the United States Government in any sum or sums whatsoever. (Record, p. 41.) In his answer to the amended petition (Record, p. 41) the plaintiff in error set up further indebtedness of the defendant in error to the Panama Canal or the United States. In his reply to answer of the plaintiff in error (Record p. 48) the defendant in error denied his liability for any indebt-

edness claimed to be due from him to the Panama Canal or the United States. Nearly all of the evidence introduced and carried into the bill of exceptions related to the indebtedness of the defendant in error for house rent. (Record, pp. 131 to 230.)

The district judge who tried the case decided that William H. Jackson, defendant in error, was not indebted to the Panama Canal or the United States (Record, pp. 104 to 114). This decision was adopted by the Circuit Court of Appeals, Fifth Circuit. This shows clearly that the issue of the indebtedness of William H. Jackson, the plaintiff in error, to the Panama Canal or the United States was raised and decided by both courts below. A judgment based on this decision affects the United States by determining the use that can be made of its property by the defendant in error. If this was a material issue the United States was not only the real party in interest, but a necessary party. *Stanley* v. *Schwalby*, 147 U. S. 508, 512; *Belknap* v. *Schild*, 161 U. S. 10, 18; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387; *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601, 605; *Oregon* v. *Hitchcock*, 202 U. S. 60, 61; *Hopkins* v. *Clemson*, 221 U. S. 636, 648; *Louisiana* v. *McAdoo*, 234 U. S. 627.

In *Stanley* v. *Schwalby*, 147 U. S. 508, the principles applied were stated in the syllabus as follows:

> For the purposes of jurisdiction there is no distinction between suits against the Government directly and suits against its property.

> Where property of the United States is involved in a litigation to which they are not technically parties under authority of an act of Congress, the attorney for the United States may intervene by way of suggestion, and in such case the court will either stay the suit or adjust its judgment according to the rights disclosed on the part of the Government.

In *Belknap* v. *Schild*, 161 U. S. 10, 18, the question at issue was whether an officer of the United States could be enjoined from using a caisson which had been built by the United States and was owned by and in possession of the United States, which caisson infringed a patent right owned by Schild. In considering the case the court said at page 18:

> But no injunction can be issued against officers of a State to restrain or control the use of property already in the possession of the State, or money in its treasury when the suit is commenced; or to compel the State to perform its obligations; or where the State has otherwise such an interest in the object of the suit as to be a necessary party. *Louisiana* v. *Jumel*, and *Elliott* v. *Wiltz*, 107 U. S. 711, 720–728; *Cunningham* v. *Macon & Brunswick Railroad*, 109 U. S. 446, 454–457; *Hagood* v. *Sothern*, 117 U. S. 52, 70; *In re Ayers*, 123 U. S. 443; *North Carolina* v. *Temple*, 134 U. S. 22; *McGahey* v. *Virginia*, 135 U. S. 662, 684.

and at page 24:

> In the present case, the caisson gate was a part of the dry dock in a navy yard of the United States, was constructed and put in place by the United States, and was the prop-

erty of the United States, and held and used by the United States for the public benefit. If the gate was made in infringement of the plaintiff's patent, that did not prevent the title in the gate from vesting in the United States. The United States, then, had both the title and the possession of the property. The United States could not hold or use it, except through officers and agents. Although this suit was not brought against the United States by name, but against their officers and agents only, nevertheless, so far as the bill prayed for an injunction, and for the destruction of the gate in question, the defendants had no individual interest in the controversy; the entire interest adverse to the plaintiff was the interest of the United States in property of which the United States had both the title and the possession; the United States were the only real party, against whom alone in fact the relief was asked, and against whom the decree would effectively operate; the plaintiff sought to control the defendants in their official capacity, and in the exercise of their official functions, as representatives and agents of the United States and thereby to defeat the use by the United States of property owned and used by the United States for the common defence and general welfare; and therefore the United States were an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought; and the suit could not be maintained without violating the principles affirmed in the long series of decisions of this court, above cited.

Minnesota v. *Hitchcock*, 185 U. S. 373, was a suit in equity commenced in the Supreme Court of the United States to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from selling any of sections 16 and 36 in what was on January 14, 1889, known as the Red Lake Indian Reservation. Ethan Allen Hitchcock, the secretary, was a citizen of Missouri, and Binger Herman, the commissioner, was a citizen of Oregon, and the suit having been brought by a State it was assumed that this gave the Supreme Court original jurisdiction. On the question of jurisdiction as to whether the United States was not the real party in interest the court said at page 382:

> A preliminary question is one of jurisdiction. It is true counsel for defendants did not raise the question, and evidently both parties desire that the court should ignore it and dispose of the case on the merits. But the silence of counsel does not waive the question, nor would the express consent of the parties give to this court a jurisdiction which was not warranted by the Constitution and laws. It is the duty of every court of its own motion to inquire into the matter irrespective of the wishes of the parties, and be careful that it exercises no powers save those conferred by law. Consent may waive an objection so far as respects the person, but it can not invest a court with a jurisdiction which it does not by law possess over the subject matter.

and at page 386:

> It may be said that the United States is not named as defendant, and therefore it can not be considered a party to the controversy. It is true that it was at one time held that the Eleventh Amendment to the Constitution of the United States, which provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State," was applicable only to cases in which the State was named in the record as a party defendant. *Osborn* v. *United States Bank*, 9 Wheat. 738. But later rulings have modified that decision, and held that the amendment applies to any suit brought in name against an officer of the State, when "the State, though not named, is the real party against which the relief is asked, and the judgment will operate." *In re Ayers*, 123 U. S. 443.

and at page 387:

> Now, the legal title to these lands is in the United States. The officers named as defendants have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale, to divest the Government of its title and vest it in the State. The United States is, therefore, the real party affected by the judgment and against which in fact it will operate, and

> the officers have no pecuniary interest in the matter. If whether a suit is one against a State is to be determined, not by the fact of the party named as defendant on the record, but by the result of the judgment or decree which may be entered, the same rule must apply to the United States. The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record but by the question of the effect of the judgment or decree which can be entered.

In *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601, an injunction was sought to restrain Bruce, postmaster at Syracuse, New York, from using a certain machine that had been leased by the United States, because it infringed a patent the plaintiff owned. The court said at page 606:

> In the case at bar the United States is not the owner of the machines, it is true, but it is a lessee in possession, for a term which has not expired. It has a property, a right *in rem*, in the machines, which, though less extensive than absolute ownership, has the same incident of a right to use them while it lasts. This right can not be interfered with behind its back and, as it can not be made a party, this suit, like that of *Belknap* v. *Schild*, must fail.

Oregon v. *Hitchcock*, 202 U. S. 60, was an original bill filed by the State of Oregon against Ethan Allen Hitchcock, Secretary of the Interior, and William A. Richards, Commissioner of the General Land Office,

to restrain them from allotting or patenting to any Indians or other persons certain lands within the limits of the Klamath Reservation, which it was alleged were on March 12, 1860, swamp and overflowed land, and praying a decree establishing the title of the State of Oregon, etc. The question of jurisdiction was raised on the ground that the United States was a necessary party because the title to be effected was in the United States. On this question the court, speaking through Mr. Justice Brewer, said at page 68:

> The question of jurisdiction of course precedes any inquiry into the merits. By section 2 of Article III of the Constitution and section 687, Revised Statutes, this court has original jurisdiction of a suit brought by a State against citizens of other States. *Pennsylvania* v. *Quicksilver Company*, 10 Wall. 553; *Wisconsin* v. *Pelican Insurance Company*, 127 U. S. 265, 287, and cases cited in the opinion; *California* v. *Southern Pacific Company*, 157 U. S. 229, 258; *Minnesota* v. *Hitchcock*, 185 U. S. 373. But the contention is that the United States is the real party in interest as defendant, that it can not be sued without its consent, and that it has given no consent. While the nominal defendants are citizens of a State other than Oregon, yet they have no interest whatever in the controversy, and if a decree be rendered against them in favor of the State it will not affect their interests but bind and determine the rights of the United States, the real, substantial defendant.

In distinguishing this case from *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387, where the court had taken jurisdiction because the United States was the real party in interest though not named as a party the court said, at page 70:

> It is true in that case we sustained the jurisdiction of this court, but we did so by virtue of the act of March 2, 1901, 31 Stat. 950, which was held to be a consent on the part of the United States to be sued in respect to school lands within an Indian reservation and an acceptance by the Government of full responsibility for the result of the decision, so far as the Indians, its wards, were concerned. But neither of the two facts deemed essential to the maintenance of that suit appear in this. There is no act of Congress waiving immunity of the United States or consenting that it be sued in respect to swamp lands, either within or without an Indian reservation, and there is no act of Congress assuming full responsibility in behalf of its wards, the Indians, for the result of any suit affecting their rights in these lands. It is unnecessary to repeat all that was said in that opinion in reference to these matters. It is sufficient to refer to it for a full discussion of the question.

In *Hopkins* v. *Clemson*, 221 U. S. 636, speaking of the immunity of States from suits the court said at page 642:

> No suit, therefore, can be maintained against a public officer which seeks to compel him to exercise the State's power of taxation, or to pay out its money in his possession on the

> State's obligations, or to execute a contract, or to do any affirmative act which affects the State's political or property rights.

In *State of Louisiana* v. *McAdoo, Secretary of the Treasury*, 234 U. S. 627, the question was raised as to whether in legal effect it was a suit against the United States, though the latter was not named on the record as a party. The court decided that the suit was one to which the United States was a necessary party and that as there was no authority from Congress under which the suit might be brought, leave to file was denied. In considering the question the court said, at page 628:

> No principle is better established than that the United States may not be sued in the courts of this country without its consent. If, therefore, this be a suit against the United States, the State, though entitled as a State to appeal to the original jurisdiction of this court, must show some authority from Congress under which such a suit may be brought, or leave to file must be denied. *United States* v. *Clarke*, 8 Peters, 436; *United States* v. *Lee*, 106 U. S. 196; *Kansas* v. *United States*, 204 U. S. 331, 333.
>
> That the United States is not named on the record as a party is true. But the question whether it is in legal effect a party to the controversy is not always determined by the fact that it is not named as a party on the record, but by the effect of the judgment or decree which can here be rendered. *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387; *Kansas* v. *United States*, supra.

These cases show clearly that in any case in which the final order will effect the property or rights of the United States, though not named as a party to the record, and that parties named have no pecuniary interest in the suit, it is in effect a suit against the United States and that, unless the United States can be made a party or has already consented to the act sought to be enforced, the court has no jurisdiction to proceed with the case. If the rights of those not before the court are inseparably connected with the claim of the parties litigant so that no final decision can be rendered without affecting the rights of the absent parties, such parties can not be dispensed with. *Mallow* v. *Hinde*, 12 Wheat. 193; *California* v. *Southern P. Co.*, 157 U. S. 229.

The right of the United States to fix terms for the use of its property in the Canal Zone by the defendant in error is inseparably connected with his claim in this case. The right to have the question of his indebtedness to the United States determined before he was paid any salary and the right, if he was so indebted, to set-off such indebtedness against any salary due him, are inseparably connected with his claim for salary.

The United States can not be sued in the District Court of the Canal Zone for salary or compensation for official services. (See par. 20, sec. 24, of the act approved Mar. 3, 1911, 36 Stat. 1093.) This paragraph gives the district courts of the United States concurrent jurisdiction with the Court of Claims where

the claim does not exceed $10,000. It contains a provision, however:

> That nothing in this paragraph shall be construed as giving to * * * the district courts jurisdiction of cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof. * * *

Even if the District Court of the Canal Zone were a United States district court or had the same jurisdiction as a United States district court, it would have no jurisdiction to entertain a suit against the United States to recover salary or compensation for official services.

There is no special statute giving the District Court of the Canal Zone jurisdiction of suits against the United States. In all cases therefore in which the United States is a necessary party, defendant, the suit must fail. Its rights can not be interfered with behind its back. *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601.

The claim which the plaintiff in error seeks to have enforced is a claim against the United States. *Hobbs* v. *McLean*, 117 U. S. 567, 575. In this case the court said (p. 575):

> What is a claim against the United States is well understood. It is a right to demand money from the United States.

An application for a mandamus to compel the allowance and payment of such a claim is a suit against the United States. *Mississippi* v. *Durham*, 4 Mackey (D. C.) 235. The court said at pages 237 and 240:

> But the question here is simply whether if a claim be presented to the Treasury and rejected for reasons which, to the judicial mind, might seem utterly untenable, it is competent for a court to enforce its payment by mandamus. Section 236 of the Revised Statutes provides that "all claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or creditors, shall be settled and adjusted in the Department of the Treasury." The organization of the department is so comprehensive, so thorough, so exact, it is supplied not only with skilled accountants, but special law officers, and besides has on proper occasion the right to call in aid the opinion of the Attorney General of the United States, that it seems fully equipped for the discharge of every fiscal duty and exigency. And, therefore, independently of general considerations of abstract policy, the Government would seem to be justified in maintaining in all its integrity the dogma that it can not, by any form of process, base its rights of property, subjected to the arbitrament of a judicial tribunal, without its explicit consent in due form of law.
>
> * * * * *

> Now, it does not require argument to manifest that a refusal by an officer of the Treasury Department whose general duty under the law is to allow and take steps to issue a warrant for the payment of any claim is a refusal of the claim by the United States for the time being; that a mandamus against him to compel the allowance and payment thereof is a suit against the United States, and that it is none the less a suit against the United States because the ground or notices of refusal to allow may be obviously and notoriously without legal justification. In other words, that no error of judgment or capriciousness of conduct can destroy for the time being the quality of agent and actor in the name and on behalf of the Government of the proper Treasury official in disallowing the claim of any State or individual for money due or alleged to be owing by the United States.

The money sought to be reached by the mandamus was the money of the United States, and, if there was any unlawful withholding from the defendant in error, the money was withheld by the Government of the United States acting through the governor of the Panama Canal, H. A. A. Smith, auditor of the Panama Canal, plaintiff in error, and the paymaster of the Panama Canal. The claim based upon such unlawful withholding was therefore a claim against the Government of the United States. *United States ex rel. Angarica* v. *Bayard*, 127 U. S. 251, 259; *United States ex rel. Boynton* v. *Blaine*, 139 U. S. 306, 323.

In the first case cited, page 259, the court said:

> If there was any unlawful withholding from the petitioner of the $41,129.74, the money was withheld by the Government of the United States, acting through the Secretary of State, and any claim of the petitioner, based upon an unlawful withholding, was a claim against the Government of the United States.

The United States was a necessary party to a proceeding in mandamus to enforce the claim, unless it can be held as a matter of law that the United States had consented to the act and made it the duty of the said H. A. A. Smith, auditor of the Panama Canal, to perform the specific act which it was the object and purpose of the proceedings to compel him to perform. If such can be held, the duty to be enforced would be a ministerial duty imposed by law and, although the United States might be the real party in interest, it would not be a necessary party. *Minnesota* v. *Hitchcock*, 185 U. S. 373, 386.

In this case, after a discussion of the question as to the necessity of determining jurisdiction from the real and not the nominal parties to the controversy, the court said (p. 386):

> Of course this statement has no reference to and does not include those cases in which officers of the United States are sued, in appropriate form, to compel them to perform some ministerial duty imposed upon them by law, and which they wrongfully neglect or

> refuse to perform. Such suits would not be deemed suits against the United States within the rule that the Government can not be sued, except by its consent, nor within the rule established in the *Ayers* case.

If, however, the judgment rendered or that could be rendered affected the use of property of the United States by operating on and controlling the official conduct of H. A. A. Smith, auditor of the Panama Canal, as representative and agent of the United States with relation to such property, the United States was a necessary party. See cases of *Belknap* v. *Schild*, 161 U. S. 10, 18; and *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601, 606, heretofore cited and quoted from.

The United States is the real party in interest and is also a necessary party, if the right to set-off the claimed indebtedness was properly pleaded. We have already shown that this right could be invoked as to all employees and officers of the Panama Canal and the United States and, unless William H. Jackson, defendant in error, as judge of the District Court of the Canal Zone, is in an excepted class, the answer that the sum deducted from his salary was to cover an indebtedness to the United States for the use of property of the United States was a complete bar to further proceedings in mandamus, unless the defendant in error was in a position to make the United States a party and determine this issue. The defendant in error, as we have heretofore shown, could not make the United States a party defendant in the mandamus

proceeding. It was decided, however, by Judge Clayton, who tried the case in the District Court of the Canal Zone, that deduction can not be made from the salary of Federal judges to cover indebtedness due to the United States (Record pp. 84 to 86). A complete answer to this contention is that William H. Jackson, the defendant in error, judge of the District Court of the Canal Zone, is not a Federal judge within the meaning of that term as used by the Supreme Court in the case of *Benedict* v. *United States*, 176 U. S. 357, 361. He is a civil officer. He is not the judge of a United States court. *United States* v. *Fisher*, 109 U. S. 143; *McAllister* v. *United States*, 141 U. S. 175. He has no greater or higher right to be paid his salary without deduction for indebtedness due the United States than any other civil officer of the United States. This is conclusively shown by the cases just cited.

It therefore follows that the indebtedness of William H. Jackson, the defendant in error, was properly set up as an answer to his petition for a mandamus, that any judgment that was or could be rendered on it would only affect the property and rights of the United States, that the United States was a necessary party, and, as the United States could not be made a party, the petition should have been dismissed for want of jurisdiction to proceed.

The right to the use of property of the United States as quarters has long been regarded as a proper subject matter of suits against the United States when officers of the Army and Navy have been

deprived of such use where entitled to it or its equivalent. This right to the use of quarters is usually referred to as allowances or emoluments. See cases of *United States* v. *Phisterer*, 94 U. S. 219; *United States* v. *Lippett*, 100 U. S. 663.

The Comptroller of the Treasury has decided that the use of a house by the defendant in error constitutes an emolument which he would be prohibited from receiving under the Panama Canal act.

The judgment of the Circuit Court of Appeals should be reversed for the second and fifth errors assigned.

(c) Mandamus as provided for in the Code of Civil Procedure of the Canal Zone is an original action brought for the purpose of securing relief by the writ and the merits would be triable in such a proceeding. The court has no power to issue the writ except in cases where it has jurisdiction of the necessary parties to a suit on the merits.

Section 8 of the Panama Canal act, 37 Stat. 565, provides that—

> The said district court shall have original jurisdiction of all felony cases, of offenses arising under section ten of this act, all causes in equity; admiralty and all cases at law involving principal sums exceeding three hundred dollars and all appeals from judgments rendered in magistrates' courts. The jurisdiction in admiralty herein conferred upon the district judge and the district court shall be the same that is exercised by the United States district judges and the United States

district courts, and the procedure and practice shall also be the same. The district court or the judge thereof shall also have jurisdiction of all other matters and proceedings not herein provided for which are now within the jurisdiction of the Supreme Court of the Canal Zone, of the Circuit Court of the Canal Zone, the District Court of the Canal Zone, or the judges thereof.

Section 9 of the Panama Canal act provides:

> All existing laws in the Canal Zone governing practice and procedure in existing courts shall be applicable and adapted to the practice and procedure in the new courts.

Sections 552, 554, and 555 of the Code of Civil Procedure of the Canal Zone of 1907 (Record, p. 71) conferred jurisdiction on the Supreme Court and the Circuit Court of the Canal Zone in mandamus and regulated the procedure in such cases. These sections provide:

> Sec. 552. Procedure in Mandamus.—The Supreme Court shall have concurrent jurisdiction with the circuit courts in all cases where any inferior tribunal, corporation, board, or person unlawfully neglects the performance of an act which the law specially enjoins as a duty resulting from an office of trust or station, or unlawfully excludes the plaintiff from the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully excluded by such inferior tribunal, corporation, board, or person, and also shall shall have original jurisdiction over circuit

courts, and judges thereof, wherever said court or judge unlawfully neglects the performance of a duty which the law specifically or specially enjoins as a duty imposed upon such court or judge. The procedure of the Supreme Court in mandamus proceedings shall be the same as those provided for mandate in this code.

Sec. 554. Preliminary injunctions in certiorari, mandate, prohibition proceedings.—In certiorari, mandamus, and prohibition proceedings an injunction may be granted by any judge of the Supreme Court, if in his judgment such injunction is necessary for the preservation of the rights of the parties pending litigation.

Sec. 555. Expediting such proceedings.—The court may, in its discretion, make such orders as it deems necessary for expediting proceedings in petitions for certiorari, mandamus, or prohibition proceedings.

It will be noted that section 552 of the Code of Civil Procedure provides that:

> The procedure of the Supreme Court in mandamus proceedings shall be the same as those provided for mandate in this Code.

Sections 233, 234, 235, and 236 of the Code of Civil Procedure of the Canal Zone provide:

> Sec. 233. Mandate.—When the complaint in an action in a circuit court alleges that any inferior tribunal, corporation, board, or person unlawfully neglects the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station, or un-

lawfully excludes the plaintiff from the use and enjoyment of a right or office to which he is entitled and from which he is unlawfully precluded by such inferior tribunal, corporation, board, or person, and the court, on trial, finds the allegations of the complaint to be true, it may, if there is no other plain, speedy, and adequate remedy in the courts of law, render a judgment granting a peremptory order against the defendant, commanding him, immediately after the receipt of such order, or at some other specified time, to do the act required to be done to protect the rights of the plaintiff.

Sec. 234. Damages in such action.—If judgment be given for the plaintiff, he may recover in the same action the damages which he has sustained, as determined by the court, by reason of the wrongful acts of the defendant, together with costs.

Sec. 235. Service of the order.—A certified copy of the judgment and order of mandate shall be served upon the defendant in such manner as the court may direct.

Sec. 236. Enforcement of order of mandate.—When a peremptory mandate has been issued to and served upon any inferior tribunal, corporation, board, or person, as provided in the preceding section, if it be made to appear to the court that any member of such tribunal, corporation, or board, or such person upon whom the order has been personally served, has, without just excuse, refused or neglected to obey the same, the court may, upon motion and notice to the defendant and hearing, impose a

fine not exceeding five hundred dollars upon the person offending.

In case of persistence in a refusal of obedience, the court may order the party to be imprisoned until the order is obeyed, and may make any orders necessary and proper for the complete enforcement of the mandate.

It will be noted that in section 233 the court, on trial, must find the allegations of the complaint to be true and that there is no other plain, speedy, and adequate remedy in the court of law.

Under the heading of parties to actions, chapter 6 of the Code of Civil Procedure of the Canal Zone, it is provided in section 107:

> Every action must be prosecuted in the name of the real party in interest.

It is also provided in this section:

> Any person should be made a defendant who has or claims an interest in the controversy or the subject-matter thereof adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein.

It is also provided in section 115:

> The court may determine any controversy between parties before it if it can be done without prejudice to the rights of others or by preserving their rights for future action; but when a complete determination of the controversy can not be had without the presence of other parties, the court must order them to be brought in, and to that end may order

amended or supplemental pleadings, or a cross complaint, to be filed and summons therein to be duly issued and served.

It is clear from these provisions of the Code of Civil Procedure of the Canal Zone that they do not contain any provision authorizing a proceeding in mandamus where the United States would be a necessary party to such proceeding and that in all cases where the United States is a necessary party the court would be without jurisdiction in the absence of any consent having been given to make it a party in such proceeding.

Moreover, these proceedings are authorized by local laws only, which have no general application. They were not enacted as statutes of general application under the general legislative powers of Congress, to be operative throughout the United States, but an exercise of the purely local power of Congress to govern the Canal Zone as territory of the United States. *Washington and Mount Vernon Ry.* v. *Downey,* 236 U. S. 190, 193. The procedure in mandamus authorized by the Civil Code of Procedure for the Canal Zone being one under local law applicable only in the Canal Zone, it manifestly could not extend to a case in which the relief prayed for, if granted, would have an extra-territorial effect by exercising a controlling power over a ministerial officer of the United States whose functions are not local and by giving to the act such officer is commanded to do force and effect throughout the United States.

In respect to its local jurisdiction and procedure, the District Court of the Canal Zone is like a State court. A State court can not issue a mandamus to an officer of the United States. *McClung* v. *Silliman*, 6 Wheat. 598; in re *Blake & Others ex parte*, 175 U. S. 114, 119.

It is probably true that in all of the organized territories of the United States and all of the territories that have been organized, there have been provisions in the local laws applicable to such territories for use of the writ of mandamus in appropriate cases. I know of no decided cases, however, where, under such laws, the territorial courts have used such writ to control the ministerial officers of the United States located in such Territories as officers and agents of the United States. So far as the functions of officers in the Territories are purely local and have to do only with local government, the writ could probably be used by the local courts, created for such Territories.

The judgment of the Circuit Court of Appeals should be reversed for the third error assigned.

(d) The control of the ministerial officers and agents of the United States in the Canal Zone by the writ of mandamus is an exercise of the judicial power of the United States under section 1, article 3, of the Constitution, and no part of this judicial power has been or can be conferred upon the district court of the Canal Zone.

The court in this case is asked to issue a writ of mandamus in an original action brought for the purpose of securing the relief by the writ. It is well

settled that the courts of the United States have no power to issue a writ of mandamus in an original action brought for the purpose of securing relief by the writ.

In *Covington Bridge Co.* v. *Hager*, 203 U. S. 109, the court at page 111 said:

> We deem it settled beyond controversy, until Congrss shall otherwise provide, that circuit courts of the United States have no power to issue a writ of mandamus in an original action brought for the purpose of securing relief by the writ, and this result is not changed because the relief sought concerns an alleged right secured by the Constitution of the United States.

In *Fuller* v. *Aylesworth*, 75 Fed. Rep. 694, in an opinion by Judge Taft, it was said:

> It is settled by a long line of decisions of the Supreme Court that the circuit courts of the United States have no jurisdiction to consider and decide a suit for a mandamus to compel the discharge of a statutory or other duty except for the purpose of enforcing their judgments previously rendered. * * * It follows that the writ of mandamus in the circuit courts is never an independent suit, as it is in many States and in England, but it is only "a proceeding ancillary to the judgment which gives the jurisdiction, and when issued becomes a substitute for the ordinary process of execution to enforce the payment of the same as provided in the contract." * * * The result is that in the circuit courts of the United States there must be a judgment for the recovery of money before there can be a mandamus to

> levy a tax to pay it, and that the mandamus is only a form of executing the judgment.

District courts of the United States have no jurisdiction to issue a writ of mandamus as an original writ in any case. *Graham* v. *Norton*, 15 Wall. 427.

In re Commonwealth of Massachusetts, 197 U. S. 482, the Supreme Court at page 488 said:

> And it has been repeatedly held, as to the circuit courts, that they have no power under section 716 to issue writs of prohibition and mandamus, except when necessary in the exercise of their existing jurisdiction. *Bath County* v. *Almy*, 13 Wall. 244, 248; *McClung* v. *Silliman*, 6 Wheat. 598, 601.
>
> This is equally true of this court, that is to say, that in cases over which we possess neither original nor appellate jurisdiction we can not grant prohibition or mandamus or certiorari as ancillary thereto.

In re Glaser, 198 U. S. 171, the court said:

> In cases over which this court possesses neither original nor appellate jurisdiction it can not grant mandamus.

It necessarily follows from these cases that unless it can be held that the District Court of the Canal Zone has been given greater power and authority by the Panama Canal act in the use of the writ of mandamus than is conferred upon the Federal Courts of the United States the District Court of the Canal Zone has no power to use this writ as an original writ to control the action of officers or private agents of the United States in the Canal Zone.

It may be true that in cases in which the District Court of the Canal Zone has jurisdiction of the parties and the subject-matter it can use the writ of mandamus under the Code of Civil Procedure as an original action brought for the purpose of securing relief by the writ, but it would necessarily follow in all such cases, by the very terms of the Code of Civil Procedure, that every such case would have to be prosecuted against the real party in interest, and that unless such party could be made a defendant the writ could not be issued. As has heretofore been shown the United States is a necessary party to this proceeding as carried on under the Code of Civil Procedure of the Canal Zone, and as it can not be made a party defendant in such proceeding it follows that the writ can not be issued even under the Code of Civil Procedure of the Canal Zone. The very scope of the remedy given in said Code indicates that it was never intended by it that the writ of mandamus should be used to control the ministerial officers of the United States in the Canal Zone. Under this Code these officers could be required to pay damages to be recovered in the same action, and if the officer refused he could be imprisoned until he had performed every requirement specified in the mandate.

The fact that Congress has failed to confer upon the courts of the United States, except in the District of Columbia, power to issue a writ of mandamus in an original action brought for the purpose of controlling the ministerial officers of the United States and securing relief by the writ, and that the writ can

not be used at all in State courts to control the ministerial officers and agents of the United States, furnishes a strong presumption that it was not intended by the Code of Civil Procedure to confer power on the courts of the Canal Zone to control the ministerial officers of the United States in the Canal Zone by the use of this extraordinary writ. The right of the District Court of the Canal Zone to issue the writ of mandamus in an original action brought for the purpose of securing relief by the writ in the manner provided for in the Code, in all cases except where the United States is a necessary party or where it is sought by the writ to control the ministerial officers and agents of the United States in the Canal Zone, is consistent with the character of this court. It is not a United States court within the meaning of Article III, section 1, of the Constitution of the United States. This section provides:

> The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavoir, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

No part of the judicial power of the United States to be exercised under the above provision of the Constitution is conferred upon the District Court of the Canal Zone for the very good reason that it is incapable of receiving it.

In *McAllister* v. *United States*, 141 U. S. 174, the Supreme Court held that inferior courts established under the provisions of the above article of the Constitution must possess the constitutional tenure of office before they can become invested with any portion of the judicial power of the Union. On page 182 of the decision the court, in referring to the rule that the judicial power of the United States could not be conferred upon courts the judges of which had a limited tenure, said:

> There is no exception to this rule in the Constitution. The Territorial courts therefore were not courts in which the judicial power conferred by the Constitution on the Federal Government could be deposited. They were incapable of receiving it, as the tenure of the incumbent was but for four years.

The right to control the ministerial officers of the United States by the extraordinary writ of mandamus is a part of the judicial power of the United States and can only be conferred upon and exercised by courts capable of receiving such judicial power. The only courts that can receive such judicial power are courts of the United States the judges of which have a tenure of office during good behavior.

That the power to control ministerial officers or private agents of the United States by means of the writ of mandamus is one of the judicial powers of the United States is sustained by the cases of *McClung* v. *Silliman*, 6 Wheat. 598, and *Kendall* v. *United States*, 12 Pet. 524.

In the case of *Kendall* v. *United States*, after reviewing prior cases on the subject, the court said, at page 617:

> The result of these cases, then, clearly is that the authority to issue the writ of mandamus to an officer of the United States, commanding him to perform a specific act required by a law of the United States, is within the scope of the judicial powers of the United States, under the Constitution. But that the whole of that power has not been communicated by law to the circuit courts; or, in other words, that it was then a dormant power not yet called into action and vested in those courts; and that there is nothing growing out of the official character of the party that will exempt him from this writ, if the act to be performed is purely ministerial.
>
> It must be admitted, under the doctrine of this court in the cases referred to, that unless the circuit court of this district is vested with broader powers and jurisdiction in this respect than is vested in the circuit courts of the United States in the several States, then the mandamus in the present case was issued without authority. But in considering this question, it must be borne in mind that the only ground on which the court placed its decision was that the constitutional judicial powers on this subject had not been imparted to those courts.

This was a case which came up on writ of error to the Circuit Court of the United States for the District of Columbia, sitting for the county of Washington.

The court issued the writ, but did so on the ground that by the act of February 27, 1801, the Circuit Court of the District of Columbia was given greater jurisdiction than had been conferred upon the circuits courts of the United States. After fully considering the jurisdiction conferred upon the Circuit Court of the District of Columbia, the court said, at page 625:

> We are then to construe this third section of the act of 27th of February, 1801, as if the eleventh section of the act of 13th of February, 1801, had been incorporated at full length; and by this section it is declared, that the circuit court shall have cognizance of all cases in law or equity, arising under the Constitution and laws of the United States, and treaties made, or which shall be made under their authority; which are the very words of the Constitution, and which is, of course, a delegation of the whole judicial power, in cases arising under the Constitution and laws, etc.; which meets and supplies the precise want of delegation of power which prevented the exercise of jurisdiction in the cases of *McIntire* v. *Wood*, and *McClung* v. *Silliman;* and must, on the principles which governed the decision of the court in those cases, be sufficient to vest the power in the circuit court of this district.

The Circuit Court of the District of Columbia was one of the inferior courts of the United States, created under Article III, section 1, of the Constitution, and was capable of receiving all of the judicial power

of the United States which Congress thought wise to confer upon it. Its judges were appointed during good behavior and did not hold office for a limited term.

The act of September 24, 1789, section 14, 1 Stat. 81, was carried into the Revised Statutes as section 716 and defined the writs which might be issued by the Supreme Court, the circuit and district courts of the United States, as follows:

> Sec. 716. The Supreme Court and the circuit and district courts shall have power to issue writs of scire facias. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

This section has been frequently construed by the Supreme Court of the United States and the proposition stated in *Covington Bridge Co.* v. *Hager, supra*, established.

Section 11 of the act of February 13, 1801, 2 Stat. 92, defined the powers of the Circuit Court of the United States and provided that it should have cognizance of—

> * * * all actions, or suits, matters or things cognizable by the judicial authority of the United States, under and by virtue of the Constitution thereof, where the matter in dispute shall amount to four hundred dollars, and where original jurisdiction is not given by the Constitution of the United States to

> the Supreme Court thereof, or exclusive jurisdiction by law to the district courts of the United States.

This act was in force at the time of the passage of the act of February 27, 1801, 2 Stat. 103, entitled "An act concerning the District of Columbia." Section 3 of this act provided:

> That there shall be a court in said District, which shall be called the Circuit Court of the District of Columbia; and the said court and the judges thereof shall have all the powers by law vested in the circuit courts and the judges of the circuit courts of the United States. Said court shall consist of one chief judge and two assistant judges resident within said District, to hold their respective offices during good behavior. * * *

The act of April 29, 1802, 2 Stat., 156, was an act entitled "An act to amend the judicial system of the United States." Section 5 of this act provided:

> and the circuit courts constituted by this act, shall have all the power, authority, and jurisdiction within the several districts of their respective circuits that before the thirteenth day of February, one thousand eight hundred and one, belonged to the circuit courts of the United States. * * *.

It will be noted that this provision specifically limited the authority and jurisdiction of the circuit courts of the United States to that which they had before the passage of the act of February 13, 1801. *United States* v. *Schurz*, 102 U. S. 378, 394.

The Supreme Court in the case of *Kendall* v. *United States*, supra, held that this repeal of so much of the act of February 13, 1801, as conferred broad authority upon the circuit courts of the United States did not affect the jurisdiction and authority conferred upon the Circuit Court of the District of Columbia by the act of February 27, 1801, and it will be noted that section 11 of the act of February 13, 1801, gave the Circuit Court of the United States cognizance of all—

> matters or things cognizable by the judicial authority of the United States, under and by virtue of the Constitution.

This was a special delegation of the whole judicial power of the United States, and when this was conferred upon the Circuit Court of the District of Columbia, it being a court which could receive this power, it had all the judicial power that Congress could confer under the Constitution. There was no incapacity on the part of the Supreme Court of the District of Columbia to receive such judicial power of the United States as Congress thought proper to confer upon it, and the whole question in the Kendall case was whether or not this judicial power had been imparted to that court. The Supreme Court held that, in view of the fact that circuit courts of the United States had been invested with all the judicial authority of the United States under the Constitution, and that the Circuit Court of the District of Columbia had been especially invested with this power by the act of February 27, 1801, and had also

been invested with the common law power conferred by the laws of the State of Maryland to use the writ of mandamus to control ministerial officers, such court had jurisdiction and authority to use the writ of mandamus as an original process to control the ministerial officers of the United States and secure relief by the use of such writ. It was within the jurisdiction of the Supreme Court of the District of Columbia, therefore, in the case of *Roberts, Treasurer*, v. *United States*, 176 U. S. 221, to use the writ of mandamus as an original process to control the action of this ministerial officer. It does not follow from this, however, that it is within the jurisdiction of the District Court of the Canal Zone to use this writ as an original process to control ministerial officers and agents of the United States in the Canal Zone. As this is a part of the judicial power of the United States that must be imparted to the courts before they have authority to use it, it must follow that unless it has been imparted to a court that is capable of receiving it it can not be used by such court. As has been shown, the District Court of the Canal Zone is not a court to which any part of the judicial power of the United States can be imparted, for the reason that it is a court the judge of which has a limited tenure, the Panama Canal act specifically providing that the district judge of such court shall hold his office for four years and until his successor is appointed and qualified.

It follows, therefore, that even if the Code of Civil Procedure of the Canal Zone as adopted by

the Panama Canal act could be construed as attempting to confer upon the Supreme Court of the Canal Zone, the Circuit Court of the Canal Zone, and the District Court of the Canal Zone, and the judges thereof, the power to issue the writ of mandamus in an original action to control the ministerial officers or private agents of the United States in the Canal Zone, it would be ineffective for the reason that no one of these courts was capable of receiving any part of the judicial power because they were all courts the judges of which had a limited tenure, as has the judge of the existing District Court of the Canal Zone, the latter court being the successor of the three courts named in the code.

The issuance of the writ of mandamus for the purpose of controlling the action of the plaintiff in error, who was a ministerial officer or private agent of the United States in the Canal Zone, was an exercise of the judicial power of the United States, and as no part of this power was or could be conferred upon the District Court of the Canal Zone it was without jurisdiction in this case, and the petition for the writ should have been dismissed.

The governor of the Panama Canal is appointed by the President, by and with the advice and consent of the Senate, and is commissioned for a term of four years, and until his successor is appointed and qualified. (Sec. 4, Panama Canal act.) He is undoubtedly an officer of the United States. The same section provides that all other persons necessary for the completion, care, management, main-

tenance, sanitation, government, operation, and protection of the Panama Canal and Canal Zone shall be appointed by the President, or by his authority, removable at his pleasure, and the compensation of such persons shall be fixed by the President, or by his authority, until such time as Congress may by law regulate the same.

The power to make these appointments is reposed in the President. They must either be made by him direct or by his authority. This constitutes them officers or agents of the United States. *United States* v. *Hartwell*, 6 Wall. 385. In this case the court said, at page 393:

> An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties.
>
> The employment of the defendant was in the public service of the United States. He was appointed pursuant to law, and his compensation was fixed by law. Vacating the office of his superior would not have affected the tenure of his place. His duties were continuing and permanent, not occasional or temporary. They were to be such as his superior in office should prescribe.

The act under consideration gave an assistant treasurer at Boston, with the approval of the Secretary of the Treasury, power to appoint a specific number of clerks. Clerks appointed under this authority were held to be officers of the United States, the power of appointment having been con-

ferred upon the head of a department. The court said, at page 393:

> The defendant was appointed by the head of a department within the meaning of the constitutional provision upon the subject of the appointing power.

It will be noted also that the Panama Canal act provides that the persons shall be appointed by the President, or by his authority, not that they shall be employed.

The case of the *United States* v. *Hartwell*, supra, is directly in point, and seems to settle the question as to whether or not the persons appointed under the authority of the Panama Canal act are officers or agents of the United States.

The only authority for the appointment of any person employed in the service of the Panama Canal is that of the President. Every person in making an appointment of anyone employed in the Panama Canal must act by his authority.

The judgment of the Circuit Court of Appeals should be reversed for the fourth error assigned.

II.

There is no law conferring authority upon the plaintiff in error finally to allow or disallow any claim or demand upon the United States, such authority being given by law only to the accounting officers of the Treasury, and any action to be taken by the plaintiff in error in the approval or disapproval of a payment on a pay roll, pay check, or voucher was subject to review and reversal by the Auditor for the

War Department and the Comptroller of the Treasury and it was, moreover, discretionary.

This point was involved and partly considered under point I of this brief, page 23 to page 32, inclusive, in considering the first error assigned.

The authority for the issuing of the writ of mandamus was stated by the court below to be found in the Executive order purporting to be issued pursuant to the power conferred upon the President by the Panama Canal act of August 24, 1912, 37 Stat. 560. The act authorized the President to construct, maintain, and operate the Panama Canal, and to appoint such persons as he thought necessary to that end, while the Executive order created an accounting department as one of the agencies in the construction, maintenance, and operation of the canal. The auditor of the Panama Canal is the head of that department, and duties assigned to the department are not assigned necessarily to the auditor. Other officers and employees of the accounting department have duties and responsibilities independent of the auditor.

A consideration of the question whether there is any law, or regulation or order having the force of law, which directs the auditor of the Panama Canal or any other officer or employee, to pay salary to the defendant in error, requires a consideration of the method by which moneys appropriated by the Congress for the public service are controlled by statute, and a consideration of whether or not, in passing the Panama Canal act, the Congress has indicated any intention to make the appropriations for Panama

Canal construction, maintenance, and operation, and for the salaries of the district judge, district attorney, and marshal, an exception to the Government's long-established and uniform system of financial accounting and control.

Under the Constitution money can not be drawn from the Treasury except in consequence of appropriations made by law. By means of several large appropriation bills Congress each year makes provision for the maintenance and operation of the Government and the extension of its activities. The act making appropriations for sundry civil expenses is one of the annual appropriation acts, and for many years in it has been found the appropriations for the construction of the Panama Canal, and during the past three fiscal years provision also for its maintenance and operation.

Moneys appropriated by law for expenditure in the maintenance of the activities of the Government are placed under the control and direction of the heads of the ten executive departments of the Government, or under the heads of establishments independent of the executive departments and in exceptional cases placed directly under the control of the President. At the beginning of the construction of the Panama Canal the appropriations were made to enable the President to carry on the work of construction through the Isthmian Canal Commission. Subsequently, by the Panama Canal act, the President was authorized to discontinue the Isthmian Canal Commission and complete the construction and provide for the main-

tenance and operation of the canal through a governor of the Panama Canal and Canal Zone created by that law and such other persons as the President might appoint or authorize to be appointed.

The plan of organization provided for by the Panama Canal act was put into effect April 1, 1914, under the authority given to the President to fix the date. Since that time the appropriations contained in the sundry civil appropriation act, under the heading "Panama Canal," have been under the administrative control and direction of the governor of the Panama Canal. In addition to the appropriations for the canal, items were included for the salaries of the district judge, district attorney, and marshal.

Neither the appropriations for the canal nor those for the payment of the district judge, district attorney, and marshal were required by law to be paid out by the governor or the auditor of the Panama Canal or the paymaster. No law makes any direction as to the payment of these appropriations. This is true generally with reference to all appropriations made by Congress for the operation of the Government, and it is an exceptional case when the law refers to any disbursing officer as the one to make payment from an appropriation.

Appropriations of public money become effective and available for use by the departments charged with the disbursement when by appropriation warrant they are placed upon the books of the Treasury Department under the control of the Secretary of the

Treasury. More than 90 per cent of the disbursements of the Government are made through disbursing officers, and the procedure is for the departments under which such officers are employed to make requests upon the Secretary of the Treasury for moneys to be placed to the credit of such disbursing officers on the books of the Treasurer of the United States. Against these credits disbursing officers draw checks upon the Treasurer in payment of obligations of the Government created by contract for purchases or the employment of persons in the public service. Disbursing officers make payments upon vouchers or pay rolls prepared on forms prescribed by the Comptroller of the Treasury (sec. 5, act of July 31, 1894, 28 Stat. 206) when such vouchers and pay rolls are approved by responsible administrative officers and have no authority to make payments otherwise. The accounts of such disbursing officers are required to be rendered quarterly, or oftener if the Secretary of the Treasury so directs (sec. 4 of the act approved Aug. 30, 1890, 26 Stat. 413), and are sent to the proper auditor of the Treasury through the superior of the disbursing officer, so that before going to such auditor the accounts may receive the administrative examination required by law. Section 22, act of July 31, 1894, 28 Stat. 210. Upon settlement by such auditor credit is given to the disbursing officer for those disbursements that represent legal claims against the Government, and from the decision of the auditor in this particular the disbursing officer whose accounts have been settled,

or the head of the department concerned, may obtain a revision of the auditor's settlement by the Comptroller of the Treasury if application is made within one year from the date of the auditor's settlement, or the comptroller may revise any such settlement on his own motion. Section 8, act of July 31, 1894, 28 Stat. 207.

At the beginning of the Government all claims and demands were settled at the Treasury Department by the Auditor of the Treasury and the Comptroller of the Treasury. By the Treasury act of September 2, 1789, 1 Stat. 65, one auditor and one comptroller were provided for, the former to receive and state accounts and the latter to render his decision thereon. Warrants were to be issued by the Secretary of the Treasury and countersigned by the comptroller when warranted by law. This system as devised by the first Congress was adapted to the needs of the public service, and every demand against the Government was examined by the auditor and certified by the comptroller. The necessities of the service soon required advances to disbursing officers in order that public obligations might be settled promptly. These disbursing officers gradually appeared in the service and subsequently were recognized by law.

By the act of March 3, 1817, 3 Stat. 366, four additional auditors of the Treasury were created and also a Second Comptroller of the Treasury. This law abolished the accountants in the War and

Navy Departments who had a part in accounting and restored all accounting to the Treasury Department under the five auditors and the two comptrollers. In 1849 the Commissioner of Customs, with the same duties as a comptroller, was placed in charge of the revision of customs accounts stated by the first auditor. In 1836 a sixth auditor or Auditor for the Post Office Department, was created to audit postal accounts, with an appeal to the First Comptroller of the Treasury. This system continued in effect until the act of July 31, 1894, 28 Stat. 205, was passed, by which the Second Comptroller and Commissioner of Customs were abolished and the title of First Comptroller of the Treasury was changed to Comptroller of the Treasury. The six auditors were retained and their titles changed to indicate the departments whose accounts the respective auditors settled.

While the passage of the act of July 31, 1894, readjusted to some extent the jurisdiction of public accounts among the six auditors, the act did not change the jurisdiction of the accounting officers of the Treasury—the six auditors and the Comptroller of the Treasury—except in one important particular. Prior to that law the comptrollers revised all settlements made by the auditors (except as to the settlements of the sixth auditor or Auditor for the Post Office Department), while since 1894 the comptroller revises settlements only upon application as heretofore stated.

Section 7 of the act provides:

> The Auditor for the War Department shall receive and examine all accounts of salaries and incidental expenses of the office of the Secretary of War and all bureaus and offices under his direction, all accounts relating to the military establishment, armories and arsenals, national cemeteries, fortifications, public buildings and grounds under the chief of engineers, rivers and harbors, the Military Academy, and to all other business within the jurisdiction of the Department of War, and certify the balances arising thereon to the division of bookkeeping and warrants, and send forthwith a copy of each certificate to the Secretary of War.

The same section provides that the Auditor for the State and Other Departments shall receive and examine accounts of all boards, commissions, and establishments of the Government not within the jurisdiction of any of the executive departments. Under this law the accounts of the Isthmian Canal Commission, which commission was created by the act of June 28, 1902, 32 Stat. 481, and was independent of the executive departments, were settled by the Auditor for the State and Other Departments. As the President had directed that the Secretary of War, as the representative of the President, supervise the work of the Isthmian Canal Commission, the Secretary in 1904 requested, as a matter of convenience, that Congress transfer the settlement of the accounts of the Isthmian Canal Commission to the Auditor for

the War Department. This was done by the act of February 3, 1905, 33 Stat. 647:

> Hereafter the accounts for the Isthmian Canal Commission shall be audited by the Auditor for the War Department.

After the Panama Canal act of August 24, 1912, 37 Stat. 560, was passed to authorize the President to discontinue the Isthmian Canal Commission and to create the organization therein provided for, there was some question as to whether the foregoing act of 1905, in its reference to the accounts of the Isthmian Canal Commission, would continue the jurisdiction of the Auditor for the War Department over the accounts of the successor of the Isthmian Canal Commission or they would revert to the Auditor for the State and Other Departments. Before the Panama Canal act of August 24, 1912, was put into effect Congress passed the law of October 22, 1913, 38 Stat. 209:

> The money accounts of the Panama Canal under the Panama Canal act of August twenty-fourth, nineteen hundred and twelve (Statutes at Large, volume thirty-seven, page five hundred and sixty), shall continue to be audited by the Auditor for the War Department.

The reference to "money accounts" is to distinguish them from what are called property accounts, which, since the act of March 29, 1894, 28 Stat. 47, are not sent to the accounting officers of the Treasury but are settled by the administrative officers of

the several departments having custody of public property and supplies.

The Panama Canal act, so far as it related to the organization to be in charge of the Panama Canal, was put into effect April 1, 1914, and the Auditor for the War Department continued to audit the accounts. This act of October 22, 1913, supra, in its specific reference to the Panama Canal act, leaves no room for doubt as to the jurisdiction of the Auditor for the War Department over accounts paid from appropriations made by Congress under the heading of Panama Canal.

In the appropriation for the fiscal year 1915, by the act of August 1, 1914, 38 Stat. 674, Congress provided to be paid from Panama Canal appropriations "additional compensation to the Auditor for the War Department for extra services in auditing accounts for the Panama Canal." The same provision is found for the fiscal years 1916 and 1917 in the acts of March 3, 1915, 38 Stat. 883, and July 1, 1916, 39 Stat. 333.

In section 5 of the act of August 1, 1914, 38 Stat. 679, it was provided:

> That the collecting officers of the Panama Canal shall render their accounts in such detail, and shall transmit with their accounts to the accounting officers of the Treasury charged with the settlement thereof all such papers, records, and copies relating to their transactions as collectors as shall be prescribed in regulations approved by the President, and;

> in his judgment, not incompatible with the methods of accounting prescribed in the so-called Dockery Act, approved July thirty-first, eighteen hundred and ninety-four.

The act of July 31, 1894, 28 Stat. 205, is the one with reference to the jurisdiction of the accounting officers of the Treasury.

Subsequently, by section 3 of the act of March 3, 1915, 38 Stat. 886, Congress further recognized specifically the authority of the Auditor for the War Department and the Comptroller of the Treasury over the accounts of the Panama Canal. That section reads as follows:

> That in prescribing regulations under the provisions of section five of the sundry civil act of August first, nineteen hundred and fourteen, the President shall provide that in lieu of furnishing to the auditor individual detail collection vouchers, not provided for in said regulations, two competent persons, one from the office of the Auditor for the War Department, designated by the auditor, and one from the office of the Comptroller of the Treasury, designated by the comptroller, shall be sent semiannually, at such time as may be designated by the comptroller, to the Canal Zone to examine the accounts and vouchers and verify the submitted schedules of collections and report in triplicate to the Auditor for the War Department, the Comptroller of the Treasury, and the auditor of the Panama Canal; and such persons shall make such other examination into the accounts of the Panama Canal as may be

> directed by the comptroller, and for all such purposes they shall have access to all records and papers pertaining thereto. Such examination and inspection shall be made for the period covered by the persons designated as soon as practicable, and the report of such persons shall be promptly filed. * * *

The auditor of the Panama Canal occupies the position of an auditor in the administrative branch of the service, and such auditors, or, as sometimes designated, examiners of accounts, or chiefs of divisions of accounts, are to be found in all branches of the service. They perform many duties not connected with the money accounts required to be submitted to the auditors of the Treasury Department. The auditor of the Panama Canal has charge of property accounts, general bookkeeping, statistical work, inspection of offices, and many duties that are exclusively under the direction of the governor of the Panama Canal. He also, as do other administrative officers, either prepares vouchers and pay rolls to be paid from moneys appropriated by Congress or examines such vouchers and pay rolls if made up in other offices. He recommends to the governor whether the same shall be approved by the governor and transmitted to the paymaster for payment.

By the act of August 23, 1912, 37 Stat. 375, Congress enacted the following:

> Hereafter the administrative examination of all public accounts, preliminary to their audit by the accounting officers of the Treasury, shall be made as contemplated by the so-called

> Dockery Act, approved July thirty-first, eighteen hundred and ninety-four, and all vouchers and pay rolls shall be prepared and examined by and through the administrative heads of divisions and bureaus in the executive departments and not by the disbursing clerks of said departments, except those vouchers heretofore prepared outside of Washington may continue to be so prepared and the disbursing officers shall make only such examination of vouchers as may be necessary to ascertain whether they represent legal claims against the United States.

This was a specific limitation as a matter of policy on the duty of disbursing clerks of the executive departments and yet required that they pass on the legality of proposed payments. This was an application by law to the disbursing clerks in the executive departments of a procedure in this respect that has been in effect on the Panama Canal for several years and is still in effect. The obligation on the disbursing officers to determine the legality of proposed payments has reference not only to the statute law but to the construction of that law, in its relation to disbursements, made from time to time by the Comptroller of the Treasury under authority of the accounting law of July 31, 1894, 28 Stat. 208, paragraphs 5 and 6 of section 8, and to the statutory right of a disbursing officer to have a decision of the Comptroller of the Treasury before making any payment concerning the legality of which he wishes a decision, either because he is in doubt as to the sufficiency of the facts or finds

no former decision on the law of the case exactly in point, or for any other reason.

The accounting officers of the Treasury—the six auditors and the Comptroller—settle all public accounts, and there is no money appropriated by Congress and no receipts or revenues coming to the Government that are not subject to their audit. It is believed that there never has been, in the history of the Government, any public money appropriated for the maintenance of its activities that was not to be accounted for to the accounting officers. In some cases, such as those under sections 47, 48, and 291 of the Revised Statutes, the accounting officers of the Treasury may be required to decide in accordance with certificates of other officers, but an accounting must be had. In no other way could the executive branch of the Government protect the Treasury or the business of the Government be conducted in a systematic manner, the books of the Treasury Department cleared of charges against disbursing officers, and the Secretary of the Treasury be able to make a report to Congress required by law of all receipts and expenditures in compliance with the requirement of the Constitution.

To say that the auditor of the Panama Canal is the final auditor as far as appropriations by Congress for the Panama Canal or Canal Zone are concerned would be to say that the Congress had made an exception in regard to accounting to the Treasury that had never been made in connection with any other Government

funds. Not only did the Congress not intend by the Panama Canal act to confer authority upon the President by Executive order to make such an innovation in the accounting system of the Government, but it is entirely clear from a reading of the Executive orders that the President did not attempt to make any exception.

Those orders conferring authority on the accounting department of the Panama Canal were no different from orders issued by the heads of the executive departments, in the form of regulations or otherwise, governing the administrative work under their supervision. The Executive orders of January 27 and March 2, 1914 (Record, pp. 76 and 80), specifically made it the duty of the accounting department to give the administrative examination to such accounts as are required to be submitted to the United States Treasury Department, such examination being required by section 22 of the act of July 31, 1894, 28 Stat., 210, as follows:

> It shall also be the duty of the heads of the several executive departments and of the proper officers of other Government establishments, not within the jurisdiction of any executive department, to make appropriate rules and regulations to secure a proper administrative examination of all accounts sent to them, as required by section twelve of this act, before their transmission to the auditors, and for the execution of other requirements of this act in so far as the same relate to the several departments or establishments.

The requirement of the Executive order that the accounting department of the Panama Canal shall have the collection, custody, and disbursement of funds for the Panama Canal and Canal Zone is an administrative regulation conferring authority upon that department and its officers, the auditor as the head of the department, the paymaster as the paying officer, bonded to the United States and acting under sections 3620, 3622, and 3623 of the Revised Statutes, and other laws of the United States, and accountable directly to the Secretary of the Treasury and the accounting officers of the Treasury. The collector is another officer of the accounting department of the Panama Canal bonded to the United States and disposing of collections from tolls and other receipts in accordance with law and the directions of the Secretary of the Treasury and the accounting officers of the Treasury. See section 94, act of March 4, 1909, 35 Stat. 1106.

Section 6 of the Panama Canal act of August 24, 1912, 37 Stat. 564, contains, at the end of the section, the following sentence:

> Monthly reports of such receipts and expenditures shall be made to the President by the persons in charge, and annual reports shall be made to the Congress.

It has been suggested that the auditor of the Panama Canal was required under this section to make reports monthly to only one department or official, the President, and to make reports annually to only one body, Congress, and was not required

otherwise to report. An examination of the law referred to indicates that the reports have reference to the auxiliary facilities and appurtenances of the canal only. The monthly and annual reports required by this law are made by the governor of the Panama Canal to the Secretary of War, and such annual reports are transmitted to Congress. These annual reports give a summary of financial operations and are of the same character as annual reports required by general law to be made by the heads of all executive departments to the Congress.

A report to the President or to the Congress is not in any sense an accounting for public money, such accounting being required by general law of all financial officers of the Government bonded to the United States, and accounts are rendered to the accounting officers of the Treasury by such officers.

Section 236 of the Revised Statutes provides:

> All claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the Department of the Treasury.

There can be no question but that the only officer upon whom a demand legally may be made for the payment of moneys appropriated by Congress is the proper auditor of the Treasury Department, and in the present case any account, claim, or demand that may arise under any law for payment from appropriations made in connection with the Panama Canal, or

the District Court of the Canal Zone, must be presented to the Auditor for the War Department. No other officer or employee of the Government in the legislative, executive, or judicial branch has any legal obligation or authority to receive and examine such account, claim, or demand and decide what amount shall be paid from moneys in the Treasury of the United States.

The settlement of that auditor is final and conclusive upon the executive branch of the Government unless it is revised by the Comptroller of the Treasury as provided by section 8 of the act of July 31, 1894, 28 Stat. 207:

> The balances which may from time to time be certified by the auditors to the division of bookkeeping and warrants, or to the Postmaster General, upon the settlements of public accounts, shall be final and conclusive upon the executive branch of the Government, except that any person whose accounts may have been settled, the head of the executive department, or of the board, commission, or establishment not under the jurisdiction of an executive department, to which the account pertains, or the Comptroller of the Treasury, may, within a year, obtain a revision of the said account by the Comptroller of the Treasury, whose decision upon such revision shall be final and conclusive upon the executive branch of the Government: *Provided*, That the Secretary of the Treasury may, when in his judgment the interests of the Government require it, suspend payment and direct the reexamination of any account.

Even in the case of judgments against the United States after Congress has appropriated for their payment, it is required that a settlement shall be made by an auditor of the Treasury Department. The act of February 18, 1904, 33 Stat. 41, provides:

> And hereafter in all cases of final judgments and awards rendered against the United States by the Court of Claims, and of final judgments rendered against the United States by the circuit and district courts of the United States, payment thereof under appropriations made by Congress shall be made on settlements by the auditor for the department or branch of the public service having jurisdiction over the subject-matter out of which the claims arose.

While as a matter of convenience money is placed to the credit of disbursing officers and they are authorized by their superior officers to draw checks in payment of certain public obligations, there is no law by which the duty is placed upon any officer, other than an accounting officer of the Treasury at Washington, to settle public accounts and certify the amount found due for payment. The authority of the accounting officers to decide the amount that is to be paid from the Treasury has been recognized by the courts, although that authority is not in its nature one directly in issue in any suit against the United States. It is really not at issue in the present case unless it should be held that the Secretary of the Treasury is to issue warrants on approval of others than the accounting officers of the Treasury. It is

submitted that the judgment rendered in the present case is not binding on the Secretary or the accounting officers who are not parties to the case.

While the United States Court of Claims in several cases has referred to the authority of the accounting officers of the Treasury, and has expressed its opinion as to the action they should have taken upon certain accounts settled by them, it is to be noticed that such opinions by the court were outside of the case before the court. When a person sues in the Court of Claims the demand is for a judgment against the United States, and it is wholly immaterial why the amount he claims was not allowed or paid by the officers of the Treasury. The jurisdiction of the accounting officers in the executive branch of the Government is exclusive and they are responsible for their own decisions. They are subject to removal by impeachment or at the will of the President, but so long as they continue in office they are required upon their own judgment of the law and the facts to decide what is to be paid from the Treasury of the United States. Claimants in some cases have another remedy by suit against the United States in courts upon which jurisdiction has been conferred.

In *United States* v. *Kaufman*, 96 U. S. 567, which was a case involving a refund of an internal revenue tax, which refund had been allowed by the Commissioner of Internal Revenue and its payment refused by the First Comptroller of the Treasury, the Supreme Court intimated that the certificates of allowance for refunds issued by the Commissioner of

Internal Revenue were conclusive upon the accounting officers of the Treasury and that the latter should allow payment. Subsequently, in the case of *United States* v. *Savings Bank*, 104 U. S. 728, the question was again presented and it was urged upon the court that the action of the Commissioner of Internal Revenue was not conclusive on the First Comptroller of the Treasury. The court, considering this view of it, reached the conclusion that it was not material to its decision why the claim was not passed for payment by the accounting officers, and held that on their refusal to pay the remedy was by a suit in the Court of Claims.

To the same effect, see *Price* v. *Forrest*, 173 U. S. 410, 423.

From a consideration of the law as it has been from the beginning of the Government in reference to the system of accounting for public money and the settlement of all claims and demands against the United States, it is clear that there is no officer or employee in the executive branch of the Government, other than the proper officers of the Treasury Department, who has authority finally to decide upon the legality of payments from public moneys unless it be in cases where by statute the certificate of some officer is made conclusive on the accounting officers. *Shepley* v. *Cowan*, 91 U. S. 330, 340.

It is submitted that any action that might be taken by the plaintiff in error in approving or disapproving, or recommending to the governor for approval or disapproval, any proposed payment on

a pay roll or voucher was discretionary, involved the exercise of no statutory duty, and was not conclusive upon the Government or upon any of its officers or employees, but was advisory only. His action in any case is but preliminary and administrative, not differing in its legal effect from the administrative examination he makes of the accounts of the paymaster before they go to the Auditor for the War Department.

Such acts as H. A. A. Smith, auditor of the Panama Canal, plaintiff in error, was required to perform in connection with payments to William H. Jackson, the defendant in error, were official and discretionary.

Section 8 of the Panama Canal act, under which William H. Jackson, defendant in error, was appointed judge of the District Court of the Canal Zone, specifically provides that the district judge, the district attorney, and marshal "shall reside within the Canal Zone and shall hold no other office nor serve on any official board or commission nor receive *any emoluments except their salaries.*"

In approving payments to the defendant in error, it became necessary to determine whether he was receiving any emoluments other than his salary as district judge of the Canal Zone and how the receipt of such emoluments, if received, would affect his right to payment of salary. The decision of these questions required the exercise of judgment and discretion and, if the plaintiff in error had a right to decide them and to act upon his decision in determining whether he would recommend the full salary

of the defendant in error for payment, the District Court of the Canal Zone had no right to decide them for him and require him to act upon the court's decision and not upon his own. *Decatur* v. *Paulding*, 14 Pet. 496, 516.

Neither the Panama Canal act nor any other act of Congress undertakes to define what are emoluments within the meaning of the provision quoted or what effect the receipt of emoluments other than his salary by the district judge of the Canal Zone shall have upon his right to payment of salary. The Panama Canal act does not provide by whom nor how the salary of the district judge of the Canal Zone shall be paid.

It can not be said, therefore, that all questions in connection with the payment of the salary of the defendant in error had been settled and decided by the law under which he became entitled to salary. It became necessary, therefore, for the executive officers of the Panama Canal, including H. A. A. Smith, auditor of the Panama Canal, plaintiff in error, to determine, in the ordinary discharge of their official duties whether the salary was due and payable. Such acts, as the case of *Decatur* v. *Paulding*, cited above, are not mere ministerial duties.

In the case of *Decatur* v. *Paulding*, in considering the distinction between acts to be performed by executive officers as mere ministerial duties and discretionary acts, the court said, page 514:

> The head of an executive department of the Government, in the administration of the

> various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress, under which he is, from time to time, required to act. If he doubts, he has a right to call on the Attorney General to assist him with his counsel; and it would be difficult to imagine, why a legal advisor was provided by law for the heads of departments, as well as for the President, unless their duties were regarded as executive, in which judgment and discretion was to be exercised.

Continuing the court said:

> If a suit should come before this court, which involved the construction of any of these laws, the court certainly would not be bound to adopt the construction given by the head of a department. And if they supposed his decision to be wrong, they would, of course, so pronounce their judgment. But their judgment upon the construction of a law must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the act of Congress, in order to ascertain the rights of the parties in the cause before them. The court could not entertain an appeal from the decision of one of the secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment. Nor can it, by *mandamus*, act directly upon the officer, and guide and control his judgment or discretion in the matters committed to his care, in the ordinary discharge of his official duties.

If an executive officer has the right in any particular case to decide what he will do under any given set of circumstances, or to decide what his duty is, the court will not undertake to control this decision by mandamus. It seems clear that it does require the exercise of judgment and discretion to determine what are "emoluments" as used in the Panama Canal act with relation to the salary of the plaintiff in error, and that it does require the exercise of judgment and discretion to determine the question as to whether the receipt of an emolument would affect the right to make payment of the salary of the defendant in error.

The judgment of the Circuit Court of Appeals should be reversed for the sixth, seventh, and eleventh errors assigned.

III.

The plaintiff in error had no authority to approve a payment to the defendant in error which the Comptroller of the Treasury had decided was not a legal claim against the Government.

There were introduced in evidence in the trial of this case certain decisions rendered by the Comptroller of the Treasury upon the request of the Governor of the Panama Canal (Record, pp. 20, 24, 26, 28, 33, and 46). The decisions were requested and rendered under the following provision of section 8 of the act of July 31, 1894, 28 Stat. 208:

> Disbursing officers, or the head of any executive department, or other establishment

> not under any of the executive departments, may apply for and the Comptroller of the Treasury shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the Auditor and the Comptroller of the Treasury in passing upon the account containing said disbursement.

When received, the decisions were given to the plaintiff in error by the governor for his information and guidance. Acting under them, plaintiff in error did not approve or recommend for approval the payments the Comptroller had decided could not legally be made. The result of the failure of the plaintiff in error to approve the payments was that they were not made by the paymaster, and the defendant in error was left to the remedy of filing his claim with the Auditor for the War Department or bringing suit in the Court of Claims.

The Auditor for the War Department and the Comptroller of the Treasury, under the terms of this statute, would be required to refuse credit for any payments that might have been made by the paymaster contrary to the decisions. Upon the question of whether the payments should be made, the Comptroller was the superior officer of the plaintiff in error and the latter was bound to act in accordance with the decisions rendered. Such advance decisions, rendered pursuant to application made under this statute, are intended to prevent such payments by disbursing officers as will not be

allowed in the settlement of their accounts at the Treasury.

The decisions of the Comptroller of the Treasury under the authority of the act of July 31, 1894, supra, are conclusive upon executive officers and binding upon those charged with the supervision and direction of disbursements, and the subject is not one upon which the opinions of the law officers are rendered.

See Opinions of Attorney General, Volume XXI, pages 178, 181, 188, 221, 405, and 530.

It is clear that, as the plaintiff in error was subject to the order of the Comptroller of the Treasury in the approval of the proposed payments, the writ of mandamus does not lie to compel him to do what his superior had directed him not to do. *Butterworth* v. *Hoe*, 112 U. S. 50.

The decision of the Circuit Court of Appeals should be reversed for the sixth, seventh, and eighth errors assigned.

IV.

The money in the hands of the disbursing officer of the Panama Canal was money in the Treasury of the United States, and the court had no power to order its withdrawal therefrom.

The claim in this case is against the United States and the writ is directed to an officer whom the court below held has the power to direct its payment from moneys of the United States in the hands of a disbursing officer of the United States. So long as money remains in the hands of a disbursing officer, it is as much the money of the United States as if it

had not been drawn from the Treasury, and can not be reached by attachment or other process. *Decatur* v. *Paulding*, 14 Pet. 496, 513; *Buchanan* v. *Alexander*, 4 How. 20; *Brashear* v. *Mason*, 6 How. 92, 100; *United States* v. *Guthrie*, 17 How. 284; *Mississippi* v. *Durham*, 4 Mackey (D. C.) 235.

While in the present case no attachment is involved as there was in the case of *Buchanan* v. *Alexander*, supra, the principle is the same because there is involved the question of the power of the court to divert funds of the Government. It is argued that the payment of money as directed by the writ in this case would not be a diversion of the appropriation but a use justified under the language of the appropriation. This argument would be more persuasive if the Congress had specifically appropriated a sum of money and had directed that that money be paid by a designated officer to the defendant in error. The Congress has merely appropriated for the salary of the office and left it for determination by proper authority what person should receive payment from the appropriation and the amount to be paid, considering the legal title to the office, the performance of duties, or absence in excess of that provided by law.

In the case of *Mississippi* v. *Durham*, 4 Mackey (D. C.) 235, application was made on behalf of the State to compel the First Comptroller of the Treasury to take the necessary steps toward issuing a warrant for payment to the State of a sum admitted to be due unless the United States was entitled to set off

a certain other sum against the demand of the State. (For quotations from this case, see p. 48 of this brief.)

That the Fourth Auditor and the Second Comptroller of the Treasury could not be mandamused to audit and allow a claim, regardless of how plain the statute was as to the right of claimant, is sustained by *United States* v. *Lynch*, 137 U. S. 280.

The case of *Roberts* v. *United States*, 176 U. S. 221, is referred to as supporting the proposition that a mandamus will lie to compel an officer of the United States to pay money out of the Treasury. In that case the question involved was payment of an obligation of the District of Columbia, of which municipal corporation the Treasurer of the United States was ex officio commissioner of the sinking fund. (See sec. 7, act of June 11, 1878, 20 Stat. 107.) The statute construed by the court provided that this officer should sell a sufficient amount of unissued bonds of the District of Columbia to cover the provisions of the act. The Supreme Court of the District of Columbia has power to issue a writ of mandamus without the limitation upon its issuance applicable to other Federal courts. It was held in that case that the direction by Congress addressed to the Treasurer required of him the performance of a specific duty which involved no judgment or discretion but was purely ministerial. The payment he was directed to make was not from moneys in the Treasury of the United States, the withdrawal of the latter being only pursuant to the legal procedure through the Treasury accounting officers

and upon warrant of the Secretary of the Treasury. (Sec. 248, Revised Statutes.) The Treasurer pays money out of the Treasury only upon warrant, section 305, and would not be mandamused to pay otherwise. The principle of the Roberts case has no bearing upon the present case.

The judgment of the Circuit Court of Appeals should be reversed for the first and seventh errors assigned.

V.

Under the law which provides that the district judge of the Canal Zone shall be entitled to six weeks' leave of absence each year with pay, there is no authority of law for the payment of salary for leave of absence taken in excess of six weeks in one year.

The pertinent part of section 8 of the Panama Canal act (Record, p. 70) is the following:

> The district judge, the district attorney, and the marshal shall be appointed by the President, by and with the advice and consent of the Senate, for terms of four years each, and until their successors are appointed and qualified, and during their terms of office shall reside within the Canal Zone, and shall hold no other office nor serve on any official board or commission nor receive any emoluments except their salaries. The district judge shall receive the same salary paid the district judges of the United States, and shall appoint the clerk of said court, and may appoint one assistant when necessary, who shall receive salaries to be fixed by the President. The district

judge shall be entitled to six weeks' leave of absence each year with pay.

The office of district judge of the Canal Zone was created by this law; the salary to be paid, the prohibition against receiving any emoluments except his salary, the limitation on leave of absence with pay, all were contained in the same section of the law. In giving effect to this provision we are confronted with no question of deducting from the salary of the judge. The question is—What compensation has the law provided? The answer comes from the statute itself—a salary of $6,000 per annum except for any period of leave of absence or absence in excess of six weeks a year. The provision of a measure of compensation is no more a grant of or limitation on salary to be drawn than is the condition annexed to the accruing of the salary.

It is admitted in the present case that the judge absented himself from the Canal Zone the five days in excess of six weeks in the year, and no question as to inability, due to illness, to return within time was or is presented.

United States v. *Fisher*, 109 U. S. 143, was a case where the salary of a judge of a Territorial court had been fixed by law at $3,000. The Congress by a later appropriation act appropriated $2,600 as salary for the year with the limitation in the act that the salaries were "in full compensation." Upon the right of the officer to recover the difference, the Court said:

> The contention of appellee is that under the act of June 17, 1870, he was entitled to a salary

of $3,000, notwithstanding the subsequent legislation above referred to.

We can not concur in this view. The act of June 17, 1880 (1870), fixing the annual salary of appellee at $3,000, was not a contract that the salary should not be reduced during his term of office. *Butler* v. *Pennsylvania*, 10 How. 402. Nor was there any provision of the Constitution which forbade a reduction. *Clinton* v. *Engelbrecht*, 13 Wall. 434.

Congress therefore could, without the violation of any contract, reduce the salary of appellee, and had the constitutional power to do so.

Certain well-settled rules of interpretation are applicable to this case. * * *

Applying these rules, we think that the appropriation acts above referred to, so far as they concern the question in hand, are susceptible of but one meaning. Placing side by side the two clauses of the statute which relate to this controversy, their plain effect is to appropriate $2,600 for the salary of the appellee for one year, and to declare that the sum so appropriated shall be in full compensation for his services as chief justice for the year specified. There is no ambiguity and no room for construction.

There can be no question but that the Congress has power by law to increase or diminish the salary of any office created by law, except that the salaries of judges of courts of the United States established by law are not to be diminished. The defendant in error holds a statutory office the compensation of

which may be paid or withheld in accordance with the law creating the office and fixing the conditions of payment or later law. The grant by the statute of a limited leave of absence with pay would be meaningless if pay is to accrue for any longer period.

While it is not the rule for the law to specify the leave of absence with pay that may be taken by officers appointed by the President, with the advice and consent of the Senate, yet it has been done in some cases. For example, see section 1742, Revised Statutes, as to all diplomatic and consular officers, and section 1884 as to Territorial officers, including the judges.

Further discussion of the purpose of the law relating to the limitation on the leave with pay to be taken by the district judge of the Canal Zone seems unnecessary, but it may be noted that when the Congress imposed the limitation, all officers and employees serving under the Isthmian Canal Commission were allowed by the terms of their appointments and the regulations the same leave of absence with pay—six weeks in each year.

The case of *Benedict* v. *United States*, 176 U. S. 357, was relied upon by the court below. That case involved the salary of a judge of a court of the United States, protected by the Constitution, or rather of a former judge who had resigned and was entitled to the benefits of section 714 of the Revised Statutes. Without questioning the statements made in the opinion of the court, which, however, should be considered in connection with the case shown by the

record (*Weyerhaeuser* v. *Hoyt*, 219 U. S. 380, 394), it is clear that nothing that is said concerning the constitutional protection of the salaries of judges of courts of the United States has any bearing upon the question presented in the case now under review in this court. It is only necessary to apply to the statute under consideration the ordinary rules of statutory construction and it becomes evident when all the language used by the lawmakers is given some meaning that salary has not been granted for periods of leave of absence, or absence, in excess of the six weeks.

The judgment of the Circuit Court of Appeals should be reversed for the tenth error assigned.

The return made by H. A. A. Smith, auditor of the Panama Canal, plaintiff in error, to the petition and amended petition show such disputed questions of law and fact as ought not to be tried in a proceeding for mandamus. *United States ex rel Redfield* v. *Windom*, 130 U. S. 636. The judgment of the Circuit Court of Appeals should be reversed for the ninth error assigned.

CONCLUSION.

The judgment of the Circuit Court of Appeals should be reversed, with directions to that court to order the District Court of the Panama Canal to dismiss the petition.

BENJAMIN F. HARRAH,
Attorney for the Plaintiff in Error.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 457.

H. A. A. SMITH, AUDITOR OF THE PANAMA CANAL,
PLAINTIFF IN ERROR,

vs.

WILLIAM H. JACKSON, DEFENDANT IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Mandamus.

BRIEF FOR DEFENDANT IN ERROR.

JOSEPH W. BAILEY,
Attorney for Defendant in Error.

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BRIEF FOR DEFENDANT IN ERROR.

Statement of the Case.

Under the appointment by the President, and confirmation by the Senate, William H. Jackson, the defendant in error, duly qualified as district judge of the Canal Zone on

May 1, 1914, and has ever since continuously discharged the duties of his office. He became and is entitled to the same salary as that paid a district judge of the United States. (Sec. 8, Act *supra.*)

The defendant in error avers "that the Congress of the United States has heretofore appropriated funds for the payment of his salary, and has appropriated funds for salaries and expenses necessary for the civil government of the Canal Zone, including his expenses herein while engaged in the performance of his official duties, and that the funds appropriated as aforesaid are now available for the payment of said salary and expenses." And this allegation is admitted by the plaintiff in error in his answer to the petition.

H. A. A. Smith, the plaintiff in error, is the auditor of the Accounting Department of the Panama Canal, and is charged with the collection, custody and disbursement of funds for the Panama Canal and the Canal Zone, including the funds appropriated by Congress for the defendant in error's salary. The plaintiff in error has paid to the defendant in error his salary monthly and from time to time, but now withholds from him of his salary the sum of $1,131.76 for the payment of the following items of alleged indebtedness to the Panama Canal, namely:

From the salary due the defendant in error for the month of December, 1914, $170.07, for rent of residence, house No. 118, Ancon, C. Z., from May 1 to October 17, 1914, 5 months and 17 days, at the rate of $25.00 per month, and electric current for the same period at the rate of $5.55 per month; from the salary due the defendant in error for the month of January, 1916, $66.66, on account of alleged absence for a period of four days during said month of January beyond the six weeks' leave referred to in the Panama Canal Act; from the salary due the defendant in error for the month of March, 1916, $500.00, to apply on account of rent for use of residence No. 311, Ancon; from the salary due the defendant in error for the month of April, 1916, $341.97, alleged balance due for rent of house No. 311,

Ancon, to April 30, 1916, and account of one day's alleged absence beyond the six weeks' leave referred to in the Panama Canal Act; and from the salary due the defendant in error for the month of May, 1916, $53.06, account of rent for house No. 311, Ancon, and electric current; or a total sum of $1,131.76.

The defendant in error avers that he is not indebted to the Panama Canal or the United States in any sum or sums whatsoever, and denies specifically every item of the above-mentioned claim of indebtedness, and alleges that the before-mentioned sum of $1,131.76 of his salary is being unlawfully withheld from him by the plaintiff in error.

The prayer is that the plaintiff in error, the Auditor of the Panama Canal, be compelled by peremptory mandamus to audit, approve, issue and deliver to the relator warrants, vouchers or pay checks for his salary as district judge of the Canal Zone, as required by law and the practice, without regard to said claim of indebtedness set up by the respondent, which, as before stated, is denied by the defendant in error.

The plaintiff in error admits the appointment and service of the defendant in error as district judge of the Canal Zone, but he claims that he has the right and that it is his duty to withhold the said sums described on the ground of the defendant in error's alleged indebtedness for house rent and electric lights, and the sums deducted and withheld on account of five days' alleged absence from the Canal Zone in excess of the six weeks' leave of absence specially provided for in sec. 8, Act of August 24, 1912.

The foregoing statement of the case, word for word, was made by the trial judge, as it appears in his opinion, Record, 67 and 68, except that in order to adapt it to the present stage of the proceeding, I have substituted the words defendant in error for "relator" and plaintiff in error for "respondent."

Counsel for the plaintiff in error predicates his demand for a reversal of the judgment in this case on five principal propositions, which are:

1. "The district court of the Canal Zone was without jurisdiction to issue a mandamus commanding H. A. A. Smith, Auditor of the Panama Canal, plaintiff in error, to cause to be paid any sum whatever to William H. Jackson, defendant in error, out of funds appropriated by Congress."

2. "There is no law conferring authority upon the plaintiff in error finally to allow or disallow any claim or demand upon the United States, such authority being given by law only to the accounting officers of the Treasury, and any action to be taken by the plaintiff in error in the approval or disapproval of a payment on a pay roll, pay check or voucher was subject to review and reversal by the Auditor for the War Department and the Comptroller of the Treasury, and it was, moreover, discretionary."

3. "The plaintiff in error had no authority to approve a payment to the defendant in error which the Comptroller of the Treasury had decided was not a legal claim against the Government."

4. "The money in the hands of the disbursing officer of the Panama Canal was money in the Treasury of the United States, and the court had no power to order its withdrawal therefrom."

5. "Under the law which provides that the district judge of the Canal Zone shall be entitled to six weeks' leave of absence each year with pay, there is no authority of law for the payment of salary for leave of absence taken in excess of six weeks in one year."

Several subordinate propositions are advanced under the first principal proposition, but I do not think it necessary to burden the court with a discussion of them, because if the principal proposition can be successfully combated the subordinate ones fall with it.

I.

The district court of the Canal Zone was not without jurisdiction to issue a mandamus commanding H. A. A. Smith, Auditor of the Panama Canal Zone, plaintiff in error, to cause to be paid to William H. Jackson, defendant in error, his full salary as judge of the district court, out of the funds appropriated by Congress for that purpose.

Section 552 of the Code of Civil Procedure of the Canal Zone was, by the authorized order of the President, dated May 1, 1907, made a part of the law governing the Canal Zone, and expressly conferred on the Supreme Court and the circuit courts authority to issue a mandamus in a case like the one at bar. That the Supreme Court of the Canal Zone possessed the power to issue a mandamus is established by several cases. Page 134, Vol. 1, of the Published Reports of the Supreme Court of the Canal Zone, Case No. 45; Canal Zone *ex rel.* William H. Knox and Co. *vs.* Gouldsby, Vol. 2, Canal Zone Supreme Court Reports, p. 64; Canal Zone *ex rel.* Seixas *vs.* Gudger, Vol. 2, Supreme Court Reports, p. 85. In Canal Zone *ex rel.* Sucre *vs.* Owen, Vol. 2, Canal Zone Supreme Court Reports, p. 66, the court, while refusing to issue the writ of mandamus in that particular case, clearly recognized that the power to do so, in a proper case, had been conferred on it. The power possessed by the Supreme and circuit courts before the passage of the Adamson Act was vested by that act in the district court, and the district court possessed, when this case was tried, and now possesses, the power originally possessed by the Supreme Court and the circuit courts of the Canal Zone.

The district court of the Canal Zone, having the power to issue the writ of mandamus, nothing in the situation or official character of the plaintiff in error exempted him from its command. Counsel for the plaintiff in error seems to think that the Auditor of the Canal Zone could not be com-

pelled by mandamus to deliver to the defendant in error a voucher or warrant for his salary, or to cause the same to be paid, because the plaintiff in error is not the paymaster of the Panama Canal. The simple answer to that is that the statute expressly confided to the Auditor of the Panama Canal the control, custody and disbursement of certain moneys appropriated by Congress, and among those moneys was that appropriated for the payment of the salary of the district judge. The disbursement of that money was, therefore, absolutely under the control of the Auditor of the Canal Zone, and the payment of his salary to the district judge was purely a ministerial act.

II.

The salary of the judge of the district court of the Canal Zone was in no sense a claim against the United States, and did not, therefore, require the plaintiff in error "finally to allow or disallow" it.

The salary of the district judge of the Canal Zone is fixed at $6,000 per annum, and Congress specifically appropriated that sum for the payment of that salary. Under that state of the law the sole and only duty of the Auditor of the Panama Canal with respect to that particular appropriation was to apply it as Congress had directed, and in doing so he was not required, or permitted, to treat the judge's right to his salary as a claim against the United States. Counsel admits—indeed, contends—that "there is no law conferring authority upon the plaintiff in error finally to allow or disallow any claim or demand upon the United States," and yet, treating Judge Jackson's right to his salary as a claim against the United States, he did attempt "to allow" it minus the deductions. Is it conceivable that the Congress intended to vest in an auditor a discretion as to whether he would pay or withhold the salary of a judge? It is not necessary to argue that proposition, because the statement

of it is sufficient to refute it. If that were the law subordinate executive officers might withhold from any judge of any court of the United States all or any part of his salary.

What has just been said in answer to the plaintiff in error's second proposition also answers his third proposition, because if the salary of the judge of the district court for the Canal Zone is not a claim against the Government, according to the sense in which that term is used, then the Auditor had no right to refer it to the Comptroller of the Treasury for a decision, and the Comptroller of the Treasury had no right to decide it.

III.

The money in the hands of the disbursing officer of the Panama Canal was not in the Treasury of the United States.

The money to pay Judge Jackson's salary had been appropriated by Congress "out of any money in the Treasury not otherwise appropriated," and had been committed to the custody, control and disbursement of the Auditor of the Panama Canal. Obviously, if that money had not been appropriated, it could not have been subject to disbursement by any executive officer; and the very fact that the Auditor of the Panama Canal applied a part of the appropriation made by Congress to the purpose for which it was appropriated is conclusive proof that the entire amount appropriated for the payment of the judge's salary was under the control of the officer who had been lawfully appointed and directed to disburse it according to the congressional appropriation.

IV.

The salary of the district judge of the Canal Zone is an annual compensation, and the Auditor of the Panama Canal had no authority to deduct any sum from the amount appropriated by Congress on account of the judge's absence.

This question was submitted by the Secretary of War to the Department of Justice, and on page 34 of the Record appears the answer of the Attorney General, in which he declares that "without specific authority no portion of the salary of any officer of the United States may be withheld." After referring to the only statute authorizing the auditor to make deductions, the Attorney General gave it as his opinion that the United States district judge was not within the provision of that statute, and he distinctly stated that the auditor was without authority to make the deductions. This opinion of the Attorney General covers the deductions attempted, both with respect to absence and with respect to rents and electric current.

Conclusion.

As I know that the court will read the very exhaustive opinion of Judge Clayton which is printed in the Record, beginning at page 67, I would regard it as a useless tax upon your time and patience to extend this brief, for that opinion is so exhaustive and so convincing that it was adopted by the Circuit Court of Appeals when they affirmed the judgment pronounced by Judge Clayton.

JOSEPH W. BAILEY,
Attorney for the Defendant in Error.

SMITH, AUDITOR OF THE PANAMA CANAL, *v.* JACKSON.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 457. Argued March 6, 7, 1918.—Decided April 15, 1918.

The Auditor for the Canal Zone has no authority to make deductions for rent of quarters, and because of absence, from the salary of the District Judge of the Zone, as fixed and appropriated for by Congress.

Intimated that, but for the character of the proceeding (mandamus) and doubt as to intent, damages would have been inflicted on the Auditor under Rule 23, for plain abuse of administrative discretion in prosecuting this writ of error after being advised by an opinion of the Attorney General and two decisions of the courts below of his manifest duty under the statute respecting the payment of the judge's salary.

241 Fed. Rep. 747, affirmed.

THE case is stated in the opinion.

Mr. Benjamin F. Harrah for plaintiff in error.

Mr. Joseph W. Bailey for defendant in error.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

Congress provided for a district court of the Canal Zone, the appointment of a judge and the salary attached to the office. (Act of August 24, 1912, c. 390, 37 Stat. 565, § 8.) In due course the salary fixed was definitely appropriated for. It is apparent that some controversy arose as to whether the Auditor of the Canal Zone had the power to refuse to give effect to the act of Congress fixing and appropriating the salary by withholding such sum as he might think was due from the judge as rent for quarters in property belonging to the United States in the Canal Zone. We say this is to be inferred, because in 1915 the Secretary of War submitted to the Attorney General two questions: first, whether the district judge was entitled to the same privilege as to quarters in the Canal Zone there enjoyed by other employés of the Government; and second, if not, whether the Auditor had authority to deduct from the salary of the judge before paying it the sum which he considered due for rent of such quarters. Reversing the order in which the questions were asked, the Attorney General came first to reply to the second question and said: ". . . without specific authority no portion of the salary of an officer of the United States may be withheld. See 20 Ops. 626 (1893); *Benedict* v. *United States*, 176 U. S. 357 (1900). . . ."

While it is apparent that this ruling should have put the subject at rest, obviously the misconception of the

Auditor as to the nature of his powers prevented that result from being accomplished and the Auditor refused to carry out the act of Congress and deducted from the salary of the judge, fixed by Congress, not only a charge for rent of quarters, but a sum which he considered due because of the absence of the judge from the Canal Zone during a certain period. The judge thereupon commenced the proceeding which is before us to compel the Auditor to perform his plain duty under the law and pay the salary without the deductions. As the result of the action of the Auditor and the necessity for bringing the suit, the expense was occasioned the United States of calling a judge from the United States to hear the cause and Judge Clayton of the Middle and Northern Districts of Alabama proceeded to the Canal Zone to discharge that duty. He did so, stating the reasons which controlled him in an elaborate and careful opinion making perfectly manifest the error of the action of the Auditor and his wrong in refusing to observe the ruling of the Attorney General in the premises. (241 Fed. Rep. 747.) From the consequent judgment directing the payment of salary to be made without the deductions the Auditor prosecuted error from the Circuit Court of Appeals for the Fifth Circuit, in which court the judgment below was affirmed, and it is a further writ of error prosecuted by the Auditor from this court to that ruling which brings the subject-matter before us now.

The expense of printing a voluminous record has been occasioned and the views of the Auditor have been pressed before us in a printed argument of more than one hundred pages. We think, however, that we need not follow or discuss that argument, as we are of opinion that it is obvious on the face of the statement of the case that the Auditor had no power to refuse to carry out the law and that any doubt which he might have had should have been subordinated, first, to the ruling of the Attorney

General and, second, beyond all possible question to the judgments of the courts below. It follows, therefore, that the prosecution of the writ of error from this court constituted a plain abuse by the Auditor of his administrative discretion. In an ordinary case the situation would be one not only justifying but making it our duty to direct the enforcement of Rule 23 as to damages. As, however, the judgment is not one for money but relates solely to the obligation to perform a manifest public duty, and plain as may have been the abuse of discretion committed, we are fain to believe it involved no intentional disregard of official duty, we pass that subject by and our order will be

Judgment affirmed.